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K. SANKARANARAYANAN B.A., B.L.

1967

FEBRUARY

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	PAGES.
Metal Corporation of India (Acquisition of Undertaking) Act (XLIV of 1965), section 10 and Schedule, Paragraph II (b)	182
Payment of Bonus Act (XXI of 1965), sections 10, 32, 33, 34 (2), 36 and 37—Constitutional validity—Act not invalid as amounting to fraud on Constitution or colourable piece of legislation—Section 36 valid—Section 10 providing for minimum bonus irrespective of profits—Does not infringe Article 14 or 31 of the Constitution of India and is valid—Section 37 invalid—Suffers from vice of delegation of legislative power—Sections 33 and 34(2) void as offending Article 14 of the Constitution—Invalidity of sections 33, 34 (2) and 37 does not affect rest of the Act	189
Rajasthan Passengers and Goods Taxation (Amendment and Validation) Act (XXII of 1964), sections 2 and 4—Validity	234

CUMULATIVE TABLE OF CASES REPORTED.

PARTS 1—2

	PAGES
Abdul Wahced Khan <i>v.</i> Bhawani	79
I.T.Almaula <i>v.</i> M. Nagjibhai	41
Associated Clothiers, Ltd. <i>v.</i> C.I.T., Calcutta	164
Bahrein Petroleum Co., Ltd. <i>v.</i> P.J. Pappu	49
C.I.T. <i>v.</i> Girdhardas & Co.	129
C.I.T., Calcutta <i>v.</i> Bidhu Bhusan Sarkar	245
C.I.T., Gujarat <i>v.</i> Kantilal Nathuchand Sami	148
C.I.T., Mysore <i>v.</i> Canara Bank Ltd.	153
C.I.T., U.P. <i>v.</i> Nainital Bank, Ltd.	76
C.I.T., W.B., Calcutta <i>v.</i> Juggilal Kamalapat	177
Commr. of W.T. <i>v.</i> Ramaraju Surgical Cotton Mills	123
Cumbum Roadways (P.), Ltd. <i>v.</i> Somu Transport (P.), Ltd.	31
Dr. S. Dutt <i>v.</i> State of U.P.	92
Gulam Yasin Khan <i>v.</i> S.Y. Walaskar	1
Gupta & Sons <i>v.</i> Damodhar Valley Corporation	223
Hukumchand Mills, Ltd. <i>v.</i> C.I.T., Bombay	144
M/s. Jalan Trading Co. <i>v.</i> Mill Mazdoor Sabha	189
Jaora Sugar Mills (P.), Ltd. <i>v.</i> State of M.P.	98
Jawaharmal <i>v.</i> State of Rajasthan	234
M/s. Jugal Kishore Baldeo Sahai <i>v.</i> C.I.T., U.P., Lucknow	169
Kamble <i>v.</i> Sholapur Borough Municipality	117
Katra Education Society <i>v.</i> State of U.P.	5
Manikayala Rao <i>v.</i> Narasimhaswami	110
Maqbool Alam Khan <i>v.</i> Mst. Khodaija	63
Mohammad Bagban <i>v.</i> State of Gujarat	82
K. V. Narayana & Sons <i>v.</i> First Addl. I.T.O., Rajahmundry	157
Narayanappa <i>v.</i> C.I.T., Bangalore	161
Nichhalbhai Vallabhai <i>v.</i> Jaswantlal Zinabhai	106
Y.S. Panchaksharamma <i>v.</i> Y. Chinnabbayi	15
Pema Chibar <i>v.</i> Union of India	35
Prabhu <i>v.</i> Ramdeo	60
Probhudas Morarjee Rajkotia <i>v.</i> Union of India	52
Ram Chandra Aggarwal <i>v.</i> State of U. P.	139
Sree Meenakshi Mills, Ltd., Madurai <i>v.</i> C.I.T.	134
Srinivasa Ayyangar <i>v.</i> Venkatasubrahmanian Iyer	67
Srinivasan <i>v.</i> C.I.T., Madras	174
State of Kerala <i>v.</i> M/s. Ramaswami Iyer & Sons	55
N.K.M. Sulaiman Sahib <i>v.</i> M.C.M. Ismail Saheb	24
Surendra Nath Bibra <i>v.</i> Stephen Court Ltd.	12
Travancore Sugars & Chemicals, Ltd. <i>v.</i> C.I.T., Kerala	70
Union of India <i>v.</i> Metal Corpn. of India, Ltd.	182
A. Veerajau <i>v.</i> P. Venkanna	17

CUMULATIVE INDEX OF REPORTS.

PARTS 1-2

	PAGES.
Act of State—Portuguese territories acquired by India on 20th December, 1961—Resident who held import licences from Portuguese Government—If entitled to enforce right to import under such licences against Union of India—Refusal to recognise the licences—Petition under 32 of Constitution of India (1950)—If sustainable, ..	35
Bhopal State Land Revenue Act (IV of 1932), section 200 (1)—Scope—Order of Tahsildar under section 71 for ejection of <i>Shukmi</i> at the instance of <i>Khatedar</i> —Suit in civil Court by the person ordered to be ejected claiming to be <i>Khatedar</i> —If barred—Sections, 89, 92, 93 and 95—Effect	79
Bombay Tenancy and Agricultural Lands Act (LXVII of 1948), sections 31, 88 and 89 (2)—Scope and effect—Lessee from local authority—Interests acquired under Bombay Tenancy Act (XXIX of 1939)—If saved—Effect of section 88	117
Bombay Tenancy and Agricultural Lands Act (LXVII of 1948) (as amended by Act XXXIII of 1952 and XIII of 1956), sections 43-C, proviso 70, 85 and 85-A—Rights conferred by the unamended Act—If extinguished by the amending Acts of 1952 and 1955 (Acts XXXIII of 1952 and XIII of 1956)—Scope and effect of the proviso to section 43-C—Jurisdiction of civil Court to grant possession of land held by a tenant—Application of section 7 of the Bombay General Clauses Act (I of 1904)	41
Central Provinces and Berar Municipalities Act (II of 1922), section 15 (1)—Scope—Election of members to Municipal Committee—Disqualification under section 15 (1) form standing for election—When incurred—Mere relationship of a person with an employee of the Municipal Committee—If sufficient to disqualify him	1
Civil Procedure Code (V of 1908), section 2 (16), Order 22, rule 4—Suit and decree against some of the legal representatives—How for binding on the others not impleaded	24
Civil Procedure Code (V of 1908) (V of 1908), sections 11 and 144—Application for restitution under section 144—Applicability of principles of <i>res judicata</i>	63
Civil Procedure Code (V of 1908), section 21—Waiver of objection to territorial jurisdiction—Requirements—Application for stay under section 34 of Arbitration Act X of 1940 and appeal under section 39 against order refusing stay—If amounts to conceding jurisdiction of trial Court	49
Civil Procedure Code (V of 1908), section 24—Power of transfer—District Judge if can transfer reference by Magistrate to a civil Court under section 146 of the Criminal Procedure Code to another civil Court—Court to which reference is made—If <i>persona designata</i> —Proceeding if writ proceeding to which Civil Procedure Code applies	139
Civil Procedure Code (V of 1908), Order 6, rule 17—Suit for mere declaration held to be unsustainable under proviso to section 42, Specific Relief Act (I of 1877)—Amendment including prayer for consequential relief—If can be allowed after it is time barred	223
Civil Procedure Code (V of 1908), Order 6, rule 17—Suit by Hindu coparcener for partition alleging that there had been severance in status—Mayukha law requiring consent of father who continued joint with his own father and brothers—Application to amend plaint by deleting words "and have been" and "and were" from phrases "were and have (been)" and were "and are" members of a joint Hindu family—Right to grant of	106
Civil Procedure Code (V of 1908), Order 21, rules 35 (2) and 96—Execution sale of shares of some members of a joint Hindu family—Order for delivery of a joint possession with members of joint family and publication of such delivery of possession by beat of drum—Effect—If purchaser gets possession—Suit by auction-purchaser for partition—Limitation—Starting point—Limitation Act (IX of 1908), Articles 144 and 120—Applicability	110
Company—Acquisition of the undertaking by Government—Principles to determine compensation, prescribed by law—Actual cost to company of unused plant, machinery, etc.—Cost less depreciation as 'written-down value' of used machinery—If 'just equivalent'—Judicial security	182
Constitution of India, 1950 (as amended by Fourth Amendment Act, 1965), Article 31 (2)	182

Constitution of India (1950), Article 14—Plea of discrimination—Full particulars must be furnished	52
Constitution of India (1950), Article 14—Plea of discrimination—Full particulars must be given	5
Constitution of India (1950), Article 255—Act of State Legislature passed without complying with the provisions of Article 255—If can be validated by subsequent legislation	234
Constitution of India (1950), Article 226—Motor Vehicles Act (IV of 1939)—Government Order No. 1298 issued by the Government of Madras relied on by an applicant for stage carriage permit before Regional Transport Authority—Said Government Order struck down by Supreme Court during pendency of further proceedings—Applicant if barred from contending in such proceedings that the Government Order is bad—Writ proceedings against order of the State Transport Appellate Tribunal made in appeal—High Court deciding to remand the case—Remand if should be to original or appellate authority—Parties entitled to be heard in such remand	31
Constitution of India (1950), Article 227—Should be used sparingly	12
Evidence Act (I of 1872), section 116—Limitation Act (IX of 1908), section 28 and Article 144—Tenancy from year to year of lands belonging to a Hindu deity granted by its manager—If terminates with the expiry of office of such manager—Tenant if can, during continuance of the tenancy, acquire absolute title or permanent right of occupancy by prescription	17
Hindu law—Religious endowment—Lease of lands belonging to deity—Tenancy if intended to be permanent—Considerations—Tenant deliberately withholding the Sanad by which the tenancy was created—Presumption	17
Gujarat Agricultural Produce Markets Act (XX of 1964)—Validity—If infringes Articles 14, 19 and 31 of the Constitution—Declaration of emergency by the President—Effect on right to enforce the fundamental rights under Article 19	82
Imports and Exports (Control) Act (XVIII of 1947)—Imports (Control) Order (1955)—Special Exports Promotion Scheme for Engineering Goods (1963), Para 5.4—Grant of import licences under—Value for which it could be granted—Determination—Powers of licensing authority	52
Income-tax Act (XI of 1922)—Capital receipt or revenue receipt—Banking company having branch in Pakistan—Devaluation of Indian Rupee—Amount belonging to head office lying at branch in Pakistan on date of devaluation—"Blocked" and "sterilised"—and not utilised in banking operation—Remittance to India after grant of permission—Profit realised by bank on account of fluctuation in exchange rate—Nature of receipt	153
Income-tax Act (XI of 1922), section 2 (6-A), clause (c) (as amended by Finance Act, 1956)—Dividend—Company in liquidation—Accumulated profits existing on date of liquidation—Distribution by liquidator—Amount over and above accumulated surplus—Subsequent distributions—If deemed dividend—Whether and to what extent attributable to accumulated profits	129
Income-tax Act (XI of 1922), sections 5 (7-A) and 34—Back assessment—Initiation by and pendency of proceedings before two Officers—Order by one "the case is therefore filed"—Scope of the order—Transfer of case—"Case" includes pending proceedings as well as proceedings to be instituted—No specific case pending—Order of transfer—Valid—Words and Phrases—"Filed"—"Case"	245
Income-tax Act (XI of 1922), sections 10 (2) (vi), 10 (5) (b) and 33 (4) and Appellate Tribunal Rules, 1946, rules 12 and 27—Tribunal—Appeal—Powers of remand—Assessee-company registered and carrying on business in former Indian State—Constitution of India—Assessee liable to be assessed as a resident, of Part B State—Computation of written-down value and depreciation—Assessment year 1950-51—Appeal by assessee before the Tribunal—Depreciation actually allowed—Taxation Laws Order and Industrial Tax Rules of former State allowing depreciation—Applicability raised by Revenue for the first time before the Tribunal—Power of the Tribunal in entertaining plea and remanding matter back to Officer	144
Income-tax Act (XI of 1922), section 10 (2) (vii), second Proviso—Balancing charge—Assessee, a company—Transfer of assets and liability to another company under an agreement—Discharge of liabilities of assessee, cash and shares of the company—Consideration for the transfer—Difference between original cost and written-down value of house property on the date of transfer—Deemed profits—Taxability—Sale, if made in a commercial sense, criterion	164
Income-tax Act (XI of 1922), section 10 (2) (xv)—Business expenditure—Loss in dacoity—Assessee, a bank—Advances on pledge of jewellery—Theft of jewellery in a dacoity—Settlement between assessee and constituents—Excess of market value on jewels over amounts due by constituents—Payment by assessee—Expenditure—Allowable as business expenditure—Settlement, bilateral—Not merely forbearance to enforce claim—Mere forbearance to enforce claim—If an expenditure	70

Income-tax Act (XI of 1922), section 10 (2) (xv)—Business expenditure—Hindu undivided family—Karta—Salary or remuneration paid to Karta to manage family business, under a valid agreement—Existence of minor coparceners—Agreement in the interests of the family and for the benefit of minor—Amount allowable as business expenditure	169
Income-tax Act (XI of 1922), section 10 (2) (xv)—Business expenditure—Legal expenses—Restrictions in the carrying on of a business—Imposed by legislative or executive act—Legal proceedings to quash act—Expenses—Allowable business expenditure—Expenditure incurred need not be directly to earn income—Persistence in proceedings by filing successive appeals or ultimate failure—Not relevant—Assessee, mills carrying on business—Cotton spinning and weaving—Delivery of yarn, manufactured, to weavers outside for weaving into cloth—Cotton Control Order—Assessee prohibited from delivering yarn to such weavers—Legal proceedings and successive appeals to quash the order—Expenses thereof and costs payable to Government—Permissible business expenditure.	134
Income-tax Act (XI of 1922), section 10 (2) (xv)—Capital or revenue expenditure—Assessee, a company—Assets of another company in winding up and with largest Government shareholding and two other Government factories taken over under an agreement—Provision for cash consideration for sale—Percentage of profits also to be paid to Government—Payment for an indefinite period related to annual profits and not to any capital value and not as part of the purchase price—Revenue expenditure	70
Income-tax Act (XI of 1922), sections 10, 23 (1), (3), (4), (5) (a), 24 (1) first and second Provisos, 24 (2) and Proviso (c) to section 24 (2)—Loss—Carry-forward and set-off—Registered firm—Speculation loss—Whether apportionable between partners—Firm, whether entitled to carry-forward and set-off	148
Income-tax Act (XI of 1922), section 16 (3) (a) (i) and (ii)—Firm—Assessee, his wife and stranger partners—Two minor sons of assessee also admitted to benefits of partnership—Interest on accumulated profits of wife and minor sons—Whether includible in the assessment of the assessee	174
Income-tax Act (XI of 1922), section 26-A—Registration of firm—Some partners, creating trust and becoming trustees—Relinquishment of their rights in the assets of firm in favour of trust—Decd of relinquishment not registered—New firm constituted with the trust (represented by trustees) as a partner—Whether legally constituted and entitled to registration	177
Income-tax Act (XI of 1922), section 34—Back assessment—Income-tax Officer—Jurisdiction—Conditions precedent—Reasonable belief of under-assessment—Reasonable belief on the basis of omission or failure of assessee to file return or to disclose fully and truly material facts—Existence of the belief—Open to challenge in civil Court—Sufficiency of the reasons for the belief—Not justiciable—Reasons for the belief, if have a rational connection and relevant bearing to the formation of the belief—Justiciable—Recording reasons for initiation of back assessment proceedings and obtaining sanction of the Commissioner—Administrative and not quasi-judicial—No duty to communicate reasons to assessee	161
Income-tax Act (XI of 1922), section 34—Reassessment—Notice—Clause under which notice is issued, whether should be specified—Duty of assessee to disclose material facts—Production of books of accounts or other evidence—Whether sufficient	157
Income-tax Act (XI of 1922), section 66—Reference—High Court—No power to admit additional evidence	164
Interpretation of Statutes—Proviso unrelated to the main enactment	41
Interpretation of statutes—Tax legislation—Retrospective operation—Permissibility—If <i>per se</i> involves contravention of Article 19 (1) (f) or (g) of the Constitution of India	234
Landlord and tenant—Landlord not putting tenant in possession of portion of premises—Liability for rent—Doctrine of suspension of rent—Applicability in India	12
Landlord and tenant—Tenancy granted by a written instrument or a tenancy whose origin is not known—Question whether the tenancy is permanent—Determination of—Relevant factors	17
Legal Representatives—Representation—Decree properly obtained against some only of legal representatives—Binding nature on heirs not impleaded—Death of debtor after suit—Suit against legal representatives—Continuation or institution of suit after diligent and <i>bona fide</i> enquiry against some only of the legal representatives of deceased debtor—Heirs not impleaded, bound by the decree—Existence of fraud, collusion or other vitiating factors, and special defence open to the non-impleaded heir—Open to investigation by Court—Binding nature of decree—Question depends not on personal law but on law of procedure—Practice	24

	PAGE
Limitation Act (IX of 1908), Articles 134-B and 139—Scope and applicability of Article 134-B—Lease from year to year of lands belonging to a Hindu deity lawfully granted by its manager—Succeeding manager terminating tenancy and filing suit for recovery of the lands—Suit if governed by Article 134-B or 139 ..	I
Madras Agriculturists Relief Act (IV of 1938), as amended by Madras Act (XXIV of 1950), section 8 <i>Explanation III</i> —Scope—Benefit of <i>Explanation III</i> —When can be availed of ..	6
Metal Corporation India (Acquisition of Undertaking) Act (XLIV of 1965), section 10 and Schedule, Paragraph II (b) ..	18
Muhammadan law—Gift—Necessary conditions for validity of—Gift of property in the possession of a trespasser—Validity—Suit by plaintiff to recover property in the possession of defendant—Oral gift by plaintiff of suit property during pendency of—Plaintiff dying thereafter—Donee if can claim the property by virtue of the gift ..	61
Payment of Bonus Act (XXI of 1965), sections 10, 32, 33, 34 (2), 36 and 37—Constitutional validity—Act not invalid as amounting to fraud on Constitution or colourable piece of legislation—Section 36 valid—Section 10 providing for minimum bonus irrespective of profits—Does not infringe Article 14 or 31 of the Constitution of India and is valid—Section 37 invalid—Suffers from vice of delegation of legislative power—Sections 33 and 34(2) void as offending Article 14 of the Constitution—Invalidity of sections 33, 34 (2) and 37 does not affect rest of the Act. ..	189
Penal Code (XLV of 1860), sections 193 and 471—Offence under section 193—Court refusing to accord sanction to prosecute under section 195, Criminal Procedure Code (V of 1898)—Prosecution for offence under section 471—Sustainability ..	92
Rajasthan Passengers and Goods Taxation (Amendment and Validation) Act (XXII of 1964), sections 2 and 4—Validity ..	234
Rajasthan Tenancy Act (III of 1955), sections 15 and 161—Scope and effect—Tenants inducted by usufructuary mortgagee in possession when Tenancy Act came into force—Mortgagor if entitled to eject them after redemption of the mortgage ..	60
Sugar cane Cess (Validation) Act (XXXVIII of 1961), section 3—Scope and validity—If colourable legislation—Commission payable to Sugar cane Development Council—If can be collected for season when the Council had not yet come into existence ..	98
Travancore-Cochin General Sales Tax Act (XI of 1925, M.E.)—Assessment for 16th August, 1950 to 31st March, 1951—Turnover—If can include sales tax collected—Assessment on turnover including such amount—Suit for refund of excess collected—Jurisdiction of civil Court ..	55
U.P. Intermediate Education Act (II of 1921), as amended by (U.P. Act XXXV of 1958), sections 16-A to 16-I—Competency of Legislature to enact under Entry 11 of List II of Seventh Schedule to the Constitution of India—Section 16-F (4) if confers uncontrolled power—Section 16-B (3) read with section 16-D (3) if unreasonable—Section 16-D (4) if contravenes Articles 19 and 31 of the Constitution of India—Section 16-H if contravenes Article 14 of the Constitution ..	5
Wealth-tax Act, 1957 (Central Act XXVII of 1957), section 5 (1) (xxi)—Wealth-tax—Exemption—Assessee, an industrial undertaking—New and separate unit set up after the Act—Net wealth employed in establishing the new unit—Construction of factory buildings, erection of plant and machinery after the Act—Exemption—Period of exemption—Setting up unit—Commencement of operations for the establishment of unit—Distinction ..	123
Will—Construction—Disposition in favour of a person—Beneficiary if takes as a <i>persona designata</i> or by reason of his fulfilling certain legal status—Determination of—Test ..	15

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SENTENCE DETERMINATION: THE DIMINISHING ROLE OF THE JUDGE.

By

DR. R. PRASANNAN B.SC. B.L.M.L. (KER.) LL.M. J.S.D. (YALE).

Department of Law, University of Kerala.

There is a growing realization, in recent times, of the crucial importance of sentence determination amongst criminologists, administrators and Courts themselves.¹ Signalising on the one hand, the termination of the guilt adjudication phase and marking on the other, the beginning of the sanction or treatment phase, this critical decision largely determines the character of the criminal process. The policies adopted and techniques employed in sentence determination have a pervading effect in the process as a whole, which will be felt, directly or indirectly, at all other points of decision and on every agency engaged in criminal law administration.²

Sentence determination primarily involves the evolution of a compromise between the competing claims of the community and the offender. The primary need of the community for protection against offensive deviational conduct may exert pressure to adopt measures directed towards deterrence and incapacitation, in preference to other methods aimed at reinforcing community values and thereby maintaining respect for legal norms. The need for ascertaining the rehabilitative potential of the offender, in order to restore him as a productive and responsible member of the community is equally compelling. The determination should secure equality in sanctions without ignoring the requirement to 'individualise' penal treatment by taking note of the nature of the offence and the personality of the offender. Sentencing has thus become a complex function which demands, not only the ability to understand, appreciate and accommodate the conflicting criminological theories which have crept into statutory penal law, but also a unique capacity to synthesise skills of a diverse nature.³

Where should responsibility for this decision-making be vested? Could it be shouldered by the judge alone, who is qualified and trained mainly to make an adjudication on the guilt or innocence of the accused? If the sentencing responsibility is to be distributed, to what extent should the judicial power in the determination be divested?

1. In England the debate was initiated by Prof. Hermann Mannheim in his *Dilemma of Penal Reform* (1939), soon to be taken up by other prominent criminologists and criminal law administrators. In the United States, the idea has now definitely passed from the stage of mere academic debate to that of concrete enactments and their application.

2. ".....a major change in the allocation of responsibility and discretion for sentencing will affect all agencies. The offender who anticipates a high mandatory sentence will resist arrest and conviction as certainly as he will endeavour to avoid the imposition of sentence following conviction. The natural tendency, under these circumstances, therefore, is for the agencies of criminal justice administration to engage in various kinds of accommodative responses....." Ohlin and Remington. *Sentencing Structure: Its Effect Upon Systems for the Administration of Criminal Justice*, 23 Law and Contem. Problems, 495, 496 (1958).

3. "Too many and too different aspects of human life are involved to be mastered by one and the same agency, the criminal Court." Mannheim, *Criminal Justice and Social Reconstruction*, p. 197 (1946).

The role of the judge in sentence determination has undergone significant and fascinating changes during the last two centuries.

The 'pre-classical period' perhaps provided the widest possible discretionary powers to the judge in fixing the penalties. The judge could regulate the penal sanctions in accordance with his own conceptions of the gravity of the offence and the nature of the individual offender.⁴ The exercise of this unrestricted judicial discretionary authority in sentencing led to wide variance in sentences which resulted in the imposition of unnecessarily harsh and arbitrary punishments on the poor.⁵

The "definite sentence system" of the classical school was evolved as a reaction against the abuse of power that had been associated with the unbridled judicial discretion of the earlier period. Sentencing under the definite sentence system was a relatively simple matter. The classicists repudiated retribution as an aim of punishment and affirmed that deterrence was the sole justification for imposing penalty on an offender. This objective was sought to be accomplished by striking a proportion between the evil of the crime and its penalty such that the pain of punishment would outweigh the supposed pleasure derived from the commission of the offence. The classicists translated their theory into practice by prescribing sanctions for every offence according to its nature and gravity. The system deprived the judges altogether of their discretionary power in sentence determination.⁶ The function of the Court came to be reduced to the finding of guilt or innocence; the sentence determination being done automatically without regard to extenuations or aggravations.⁷

The excessive rigidity of the system was soon perceived by the administrators of criminal law. Cases arose which definitely showed that factors like infancy, idiocy and insanity and environmental pressures do affect the offender's ability to calculate rationally, the risks of pleasure and pain involved in criminal conduct. This realisation resulted in the re-introduction of a measure of judicial discrimination in sentencing in accordance with mitigating or aggravating circumstances.⁸ The Indian Penal Code was designed during this period.

4. The wide disparity in sentencing provoked strong protests from the idealistic philosophers of the eighteenth century, notably Beccaria, Bentham and Feuerbach who advocated for a humane, equalitarian and anti-authoritarian penal system. In his *Crimes and Punishments* (1764) which is considered to be "the most effective literary work of the entire eighteenth century", Beccaria attacked vigorously the arbitrary punishments imposed by judges and against such injustices in the criminal law administration as secret accusation, torture, detention and the extensive and excessive use of banishment, confiscation and capital punishment. See generally, Heath, *Eighteenth Century Penal Theory* (1963).

5. Beccaria declared emphatically: "I assert that the punishments of a noble man should in no wise differ from that of the lowest member of society. . . . It may be objected, that the same punishment inflicted on a noble man and a plebeian, becomes really different from the difference of their education, and from the infamy it reflects on an illustrious family; but I answer, that punishments are to be estimated, not by the sensibility of the criminal, but by the injury done to society, which injury is augmented by the high rank of the offender". Beccaria, *Crime and Punishment*, reproduced in Heath, *op cit* supra at p. 130.

6. "Judges in criminal cases have no right to interpret penal laws because they are not legislators. . . . there is nothing more dangerous than the common axiom 'the spirit of the laws is to be considered'. To adopt it is to give way to the torrent of opinions. . . . when the code of laws is once fixed, it should be observed in the literal sense, and nothing more is left to the judge, than to determine, whether an action be, or be not conformable to the written law." *Ibid* pp. 114-115.

7. The classical policy of prescribed terms was adopted in the French code of 1791 and soon gained wide acceptance in both civil and common law countries.

8. The French Penal Code of 1810, although more severe in some respects than the code of 20 years earlier, returned to the judge some power in sentencing, permitting them to establish penalties of imprisonment between a minimum and maximum fixed in the law in accordance with extenuating circumstances.

The emergence of the positive school of criminology gave a new impetus to the movement to greater use of 'individualisation' in penal treatment. The positivists repudiated the hedonistic theory of the classicists. They argued that the causes of criminal behaviour lie in the antecedents which could be studied by scientific methods and that the knowledge so acquired should form the basis of a programme for the scientific control of crime. As part of their programme they advocated the adoption of penal sanctions which would fit the criminal (and not the crime) and called for individualised treatment designed to rehabilitate the offender.⁹

The definite sentence system underwent significant changes as a result of the infusion of the positivist philosophy into the penal law and sentencing practices. The introduction of the various forms of conditional release made obsolete the original and obvious meaning of the definite sentence. Commutation of sentences for good behaviour and conditional release on parole¹⁰ on the expiration of some fixed part of the sentence created a form of indefinite sentence in which the maximum was the term fixed by the judge and the minimum was some fraction of the term determined by correctional authorities after ascertaining the rehabilitative potential of the defendant.

The demand for the adoption of a more idealistic form of indeterminate sentence was intensified during the latter part of the last century. The indeterminate sentence, it may be recalled, is based on the belief that one should not apply sanctions which are proportioned to the offence but to the offender and that the duration of correction should be determined on the basis of the offender's response to institutional treatment. At its extreme this would mean that the only competent agency to determine the nature and duration of the sanction is the correctional authority.¹¹ Hence some of the prominent penal reformers of the times earnestly advocated the introduction of indeterminate sentence without maximum or minimum limits. This movement gained momentum, particularly in Australia and Ireland, and to a lesser extent in the United States.¹²

California is one of the few jurisdictions which have approximated the indeterminate sentence in its undiluted form. A law passed in California in 1917 modified "the arbitrary sentencing powers of the judge" and provided that the actual term should be fixed by the Board of Prison Directors (later Adult Authority) within statutory limits.¹³ The Californian Adult Authority determines the length of

⁹. For a recent critical assessment of the contributions of Lombroso, Ferri, Garofalo and others of the Positive School see Mannheim, (Ed.). *The Pioneers of Criminology* (1960).

¹⁰. Parole was initially applied to young offenders under the indeterminate sentence at the Elmira Reformatory (New York) in 1869. It was soon extended to adult prisoners and it spread rapidly to many other jurisdictions in the United States.

¹¹. "Even if human wisdom can ascertain the different qualities of evil following through society from the commission of different crimes, surely no legislators or judges can be wise enough to determine the comparative wickedness of those who have committed these crimes. The man who has been convicted only of a petty larceny may be found, when subjected to prison discipline, to be a much more incorrigible offender than another who committed highway robbery, burglary, or arson. One of the greatest improvements in the administration of our penal code would be to withhold from the judges all discretion as to the time for which convicts shall be confined." May, New York Prison Association, cited in (U.S.) *Attorney-General's Survey of Release Procedures, Parole*, Volume 4. (Washington, 1939) p. 17.

¹². On the indeterminate system, see generally. *The Indeterminate Sentence*, United Nations, (Department of Public Information (New York), 1954 and *Attorney-General's Survey of Release Procedures*, op. cit., supra.

¹³. The Adult Authority which replaced the Board of Prison Terms and Paroles was established in 1944. Under the California Law, the Courts have power to determine whether convicted offenders should be sentenced to fine, probation or imprisonment. If they determine upon imprisonment, they must sentence to the minimum and maximum terms fixed in the penal law. After the prisoner is studied in a diagnostic centre, and ordinarily within a period of six months after sentence, the offender is interviewed by a member of the Authority and dates are tentatively set for the time of release and his discharge from parole.

time an offender will be imprisoned, as well as the duration of his parole including the date of his final discharge from parole.

But the influence of legalism was powerful enough to prevent the spread of this form of indeterminate sentence to other jurisdictions. The scepticism concerning the competency of the administrative board, the reluctance of the law givers to discard the deterrent philosophy and other factors contributed to the adoption of various forms of sentencing some of which having no real resemblance to the principle of complete indeterminacy that had earlier been espoused by the criminological positivists. Still, in many jurisdictions of the United States¹⁴ and Europe¹⁵, sentence determination is made by the trial judge alone, although the trend is unmistakably towards the adoption of indeterminate sentence, which is evident from the sentencing laws being passed by an increasing number of jurisdictions which provide a spread between the minimum and maximum terms in order to give the parole boards the responsibility for determining the actual term of imprisonment.

II

Individualisation of treatment being a theory difficult to put into application, the sentencing function, if it is to be solely vested in the judge, would lead to the inevitable reliance on his doubtful gift of prophesy. Studies made in other countries have shown that the sentencing tendency of the judge is fairly well determined before he sits on the bench.¹⁶ What determines whether a judge will be severe or lenient is to be found in the environment to which the judge has been subjected; previous to his becoming an administrator of justice. "It is not only criminals who are motivated by irrational and emotional imbalances," Prof. Henry Weihofen warns^{17, 18}:

".....the same is true also of lawyers and judges, butchers and bakers. And it is especially true on such a subject as punishment of criminals. This is a matter on which we are all inclined to have deep feelings. When a reprehensible crime is committed strong emotional reactions take place in all of us. Some people will be impelled to go out at once and work off their tensions in a lynching orgy. Even the calmest, most law-abiding of us are likely to be deeply stirred. All our ingrained concepts of morality and "justice" come into play, all our ancient tribal fears of anything that threatens security of the group. It is one of the marks of a civilized culture that it has devised with its legal procedures that minimise the impact of emotional reaction and strive for calm and rational disposition. But lawyers, judges and jurors are still human and objective, rational inquiry is made difficult by the very irrationality of the human mind itself."

Not surprisingly, the glaring inequality and wide disparity between sentences imposed for similar offences involving like circumstances have become a source of anxiety in every jurisdiction where partial or total divesting of the sentencing function has not taken place. The results of a study conducted a few years back in a certain country in the United States are quite revealing in this context.¹⁶ An

14. A study of the sentencing laws and practices in the different jurisdictions of the United States conducted by Prof. Paul W. Tappan (*Tappan, Sentencing Under the Model Penal Code*, 23 Law and Contemp. Prob. pp. 528—544) has shown that the indefinite sentence has been adopted as the exclusive form of prison sentence for felons in 8 states and that in an additional 22 states it is used more than any other type of sentence.

15. For a survey of the sentencing practices in European countries see Mannheim, *Comparative Sentencing Practice*, Ibid. pp. 557-582.

16. Gaudet, Harris and John, *Individual Differences In Sentencing Tendencies of Judges* 23, J. Crim. L. and Crim. 811, 814.

17-18. Weihofen, *The Urge to Punish*, 130, 131 (1957).

analysis was made of over 7,000 sentences imposed by six judges over a period of nine years. Since there was no special assignment of cases to any particular judge, each judge received cases in which the felonies were committed in similar circumstances and the offenders did not vary in general personal make up and social background. It was disclosed that while Judge A imposed sentence of imprisonment in 30 per cent. of the cases and Judge B in 34 per cent. of his, Judges C, D, E and F imposed such sentences in 53, 58, 48 and 50 per cent. respectively of their cases. Thus an offender convicted of a serious crime had but three chances out of ten of going to prison in Judges A and B and five chances out of ten if sentenced by Judges C, D, E or F. In the important choice between prison sentence and probation also there was considerable disparity. The survey disclosed that the range varied from 20 to 30 per cent. in the matter of allowing the defendant to remain free in the community on probation instead of sentencing him to prison. Suspension of sentence varied from 16 to 34 per cent. among the same judges. Even if the best available information about the character and antecedents of the offender is placed before the judge, as the basis for the exercise of his discretion, it is not possible to predict with reasonable accuracy the period required for a particular offender to get reformed of, if deterrence is stressed the duration of the prison term capable of frightening 'like-minded men' in the community.

The alternative methods suggested to avoid or minimise the disparity and irregularities observed in judicial sentencing, are incapable of curing the dominant defects in the system. Revision of sentence by an appellate body which is a 'twice removed tribunal' cannot obviously make any appreciable improvement on original sentencing practices. Similarly, the formulation of a detailed legislative prescription of criteria for the use of the judge to determine the nature and duration of sentence¹⁹ is also not a suitable method which would enable the proper exercise of creative discretion at the sentencing and releasing stages.

III

While it is generally agreed that a distribution of power of sentence determination is desirable, if not essential, the evolution of a satisfactory method still remains only a desired goal.

There is a total divesting of judicial authority in sentence determination in jurisdictions where the sentencing function is entrusted to an administrative board.²⁰ The judge is empowered to set only the maximum sentence which, to a considerable extent, is determined by law. The board (which is a full-time, independent body sets the minimum sentence within a certain period of time after the imposition of the maximum sentence. The Board receives reports from the police and probation officers before fixing the minimum sentence. The prosecuting authority is required by law to make a statement concerning the facts of the crime. The

19. Ferri's Penal Code Commission of Italy recommended that a schedule of 'conditions of dangerousness' and 'condition of less dangerousness' be adopted for the guidance of judges in individualising punishment. Prof. Sheldon Glueck has criticised Ferri's scheme on two grounds: Firstly, it emphasises a single feature (although it improves upon the existing practice in that that feature is a more or less lasting condition rather than an individual act) and secondly, it employs in the work of individualisation an instrument that had already been shown to be inadequate. Glueck, *Principles of a Rational Penal Code*, 41 Harv. L. Rev. 453, 467-475 (1928).

20. The Boards of Pardon and Parole in Washington and Hawaii may be taken as working models of such sentencing boards. For an account of the sentencing Procedure adopted by the Washington Board see, *Hayner Sentencing by an Administrative Board*, 23 Law and Contemp. Prob. op. cit. supra 477-491.

defence counsel is also given an opportunity to present relevant facts before the board.

The determinations made by the board are likely to be more uniform in comparable cases than would be the decisions of one judge at different times or the decisions of many judges operating independently. Again as the decision is made after gathering a significant body of knowledge which includes the results of weeks of observation of the offender and his response to various forms of treatment, the sentence imposed could reasonably be expected to be more purposeful and appropriate.²¹

Although criminological positivists have serious reservations about the competency of the trial judge to arrive at a just sentence²², (which function according to them should be transferred to a panel of experts trained in the science of human behaviour) this complete stripping of judicial discretionary authority in sentence determination is not generally favoured. The American Law Institute after giving considerable attention to the various problems involved in sentencing and treatment has evolved a modified form of indeterminate sentence in their Model Penal Code.²³ The maximum terms for felonies (which are graded into three categories according to their seriousness²⁴) is uniformly fixed by statute while determination of the minimum term is left to the judge to be fixed within the range established by law. The range between the minimum and maximum terms prescribed is sufficiently wide to adjust the treatment to the ostensible requirements of the individual and the community. Under the proposed provisions an offender faces two terms—one, a term of commitment and the other a wholly new concept, an additional term of parole.²⁵ At the time of parole release the term of imprisonment comes to an end and a parole term of specified duration commences. The code thereby imposes a mandatory parole term, the minimum being one year or one half of the actual prison term and the maximum ten years or twice the period of the actual term of imprisonment. Pre-sentence investigation is to be made in all serious cases¹ and the judge before imposing the minimum sentence is under a duty to advise the defendant of the factual contents of the pre-sentence and psychiatric investigations.²

The establishment of uniform maximum terms prescribed by statute, might facilitate the elimination of disparity in sentences, which is produced by the vary-

21. Hayner (*ob. cit. supra* at 493) notes that there are certain disadvantages in the sentence determination by administrative boards compared with "top quality judicial sentencing". The members may not possess the personal qualifications equivalent to those of high judicial officers and educational background broad enough to provide knowledge of these fields most closely related to correction—e.g.—psychiatry, psychology, law, sociology, or experience in probation, parole, law enforcement, or correctional administration. Under such circumstances the members may lack the judgment necessary to make wise decisions or the character to resist pressures from outside.

22. The arguments put forth by the positivists in this regard are summarised in Hall, *General Principles of Criminal Law*, 2nd Edition (1953), p. 56. For an extreme contra view see the following: "The worst of all penological perversions is represented by the proposals to separate treatment from the guilt-finding phase of criminal procedure. . . . Here in effect is a doctrine of the separation of criminal powers which is as impossible of realization as the doctrine of the separation of governmental powers in general administration. The punishment is logically connected with the concept of the crime and its constituent elements. The relations between crime and punishment is mutual and independent". Day, *Criminal Law and Society*, p. 57 (1964).

23. The American Law Institute gave its final approval to the Model Penal Code in May, 1962. The Code is offered as a model law rather than as a proposed uniform law. Any state or federal Government is free to accept or reject all or any part, of the Code.

24. Table III—Model Penal Code 6.06; 6.07 (Tent. draft No. 2, 1954) (As a copy of the Model Penal Code, in its finally approved form, is not available references are given from the tentative drafts).

25. *Ibid* 6.09 a (Tent. draft No. 5, 1966).

1. *Ibid*-6.06 (Tent. draft No. 2, 1954).

2. *Ibid*-7.07 (Tent. draft No. 2, 1954).

ing value systems and penal philosophies of the individual judges. It is generally felt that the judicial power to fix the maximum term is an unjustifiable restriction upon the legitimate province of the correctional authorities. But the judges would still have wide discretionary powers to determine sanctions by selecting between fine, probation and imprisonment and in fixing the minimum terms.

IV

Contemporary sentencing practices in India have, surprisingly enough, escaped the attention of the research worker on criminal justice administration. Many of the old traditions, dogmas and prejudices still seem to persist in the judicial sentencing policy pursued by the Indian Courts and comparatively little has been done to bring the teachings of criminology and penology to judges and magistrates.³ The strong pressures of retributive and deterrent philosophies exerted by the Penal Code provisions coupled with the continuing scepticism towards the efficacy of the modern diagnostic techniques, tend the Courts to depend more heavily on incarceration, at a time when more effective and constructive solutions to the crime problem are available. And any isolated enthusiastic move to introduce individualisation in sentencing has but little chances of success, because of the woefully inadequate resources available to the Courts and penal institutions. Hence the increasing knowledge and insight that had accrued in recent times in penological and allied sciences⁴ are still waiting to gain entry into our halls of justice and prison chambers.

There is no reason to hold the cheerful assumption that the discretionary powers vested in the trial judge to fix the sentence within the maximum limits prescribed under the Penal Code will not produce invidious variations in sentences.⁵ The penal history of other countries shows that the introduction of parole and other forms of conditional release is the first step to effect a distribution of responsibility in sentencing. The period of imprisonment will then be decided not by the trial judge alone but to greater extent by the parole authority. Within the maximum period fixed by the judge, the determination made by the correctional authority will become conclusive. But parole as a form of conditional release is totally unfamiliar to most of the jurisdictions in India. And it is doubtful whether the system has succeeded in securing the deserving attention of the concerned authorities in areas where it is supposedly introduced.

Any serious consideration to evolve a method for distributing the power of sentencing should necessarily be preceded by field studies of the present day sentencing practices in the various parts of the country. The ways in which judicio-correctional functions are spread, at present, among the various agencies involved and the extent to which these functions could be co-ordinated requires closer analysis. More specifically, the relative use of the sanctions prescribed under the Penal Code and other allied laws, the factors that the sentencing judge takes into

3. Crime must be regarded as a surface symptom of an extremely complex dynamic process ; its treatment will therefore be best effected if the attack is levelled at the underlying forces which contribute and produce this anti-social behaviour.

4. The impact of psycho-analytical discoveries has a profound effect upon the concept of crime and the criminal in modern times. It is believed that these discoveries will ultimately accelerate the acceptance of the thesis that a large group of the so-called criminals are really socially and psychologically ill and the ascendancy of the quarantine and treatment rationale of the penal sanctions.

5. "The law confers wide discretion to the judge and leaves it to him to decide in each case whether the act done by the offender falls short of the maximum degree of gravity and if so to what extent. . . . And so left, the judges often find themselves in a quandary as to the principle by which they should regulate their discretion. The result has been a gross inequality of the punishment awarded by different Courts. . . ." Gour, *Penal Law of India*, Vol 1, (8th Edn.), p. 321, (1966).

account in his determination, the sources of such information, the extent to which 'good time' reduction of imprisonment is allowed, the types of conditional releases available, the composition and powers of the parole authorities, the proportion between the judicially-determined prison term and the actual period of imprisonment are some of the areas which need scrutiny. The idea of diminishing the responsibility of the judge in sentence determination, highly desirable as it is, can pass from the stage of mere speculations to that of serious legislative drafts and enactments, only after getting the results of such extensive and thorough going field studies. It is high time for the research worker in India, to direct his enquiring eyes to this crucial point of decision in the criminal process.

‘CONTINUOUS SERVICE’ IN THE CASE OF INDUSTRIAL EMPLOYEES.

By

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The one determining factor that goes to confer the different ‘service benefits’ to an employee is his ‘length of service’. ‘Length of service’ in its turn would be determined by the period of ‘continuous service’, or in certain circumstances where the employment is in the same establishment or in similar and like occupations, by the totalling of the different periods of ‘continuous service’.

In the employments of Government, semi-Government organisations and autonomous bodies created by Statutes, the manner of calculation of the period of ‘continuous service’ is generally provided by the rules framed under the enabling Statute. The case of the Industrial employees falls outside the purview of these rules. The service conditions of this lot are governed by the terms of the contract with their employers or the conventions of the respective concerns. The bulk of the industrial workers (excluding those in the public sector undertakings) are thus either governed by no rules or governed by the rules of their bargaining capacity, and are regulated only by the Industrial Employment (Standing Orders) Act.

In India, the machinery of collective bargaining has not acquired that much of momentum and efficiency proportionate to the industrial growth. Under the existing economic and employment conditions, with the weak bargaining capacity of Trade Unions, it is unlikely and improbable that uniform service conditions would emerge through collective agreements between the employer and the employees. In the context, either legislative activity or in the alternative, judicial determinations could alone secure a more favourable climate of uniform service conditions which is necessary to ensure harmonious relationship between the employers and their employees.

In spite of the fact that the Factories Act¹, 1948, made provision for service conditions of the employees that come under the definition of ‘workman’ as defined in that Act and the Industrial Employment (Standing Orders) Act of 1946² provides the means of knowing the service conditions; since these apply only to particular segments of the industrial workers³, a sizeable portion of the industrial workers still remain anomalously dependent on the benevolent nature of their employers as far as the service conditions that govern them are concerned.

In administering the Labour Laws, calculation of ‘continuous period of service’ becomes necessary to determine the many benefits conferred by the respective Statutes, and it becomes all the more important where questions of gratuity, retrenchment, lay-off and strikes arise. Where consequent to illegal strike or lock-out, there results an absence from duty, break in the service is evident and the period of ‘continuous service’ stands broken.⁴

The Industrial Disputes Act, 1947⁵, did not contain any provision enabling the calculation of the period of ‘continuous service’, nor was the expression defined in the Act. But the Legislature thought it necessary to introduce in the general definition section of the Act, sub-section (eee) of section 2 defining the term ‘continuous

1. Act No. LXII of 1948.

2. Act No. XX of 1946.

3. The former applies only to the Factory workers and the latter applies only to establishments employing hundred or more workers.

4. *The Buckingham and Carnatic Co., Ltd. v. Workers of the Buckingham and Carnatic Co., Ltd.* (1953) S.C.J. 15 : (1953) 1 M.L.J. 191 : A.I.R. 1953 S.C. 47.

5. Act No. XIV of 1947.

service' to serve as the definition for the whole of the Statute; and it was so done by the Amending Act of 1953.⁶ Section 2 (eee) provided:

" 'Continuous service' means 'uninterrupted service' and includes service which may be interrupted merely on account of sickness or authorized leave or an accident or a strike which is not illegal, or lock-out, or a cessation of work which is not due to any fault on the part of the workman."

The said Amending Act of 1953 besides providing section 2 (eee) introduced Chapter V-A, which provided the sections relating to retrenchment and lay-off compensations, as well. In this Chapter V-A, section 25-B defined the expression "One Year of Continuous Service" also for the purposes of the succeeding sections 25-C and 25-F, which dealt with retrenchment and lay-off compensations respectively. Section 25-B ran as follows:—

" 'Definition of one year of continuous service'.—For the purposes of sections 25-C and 25-F, a workman who, during a period of twelve calendar months, has actually worked in an industry for not less than two hundred and forty days shall be deemed to have completed one year of continuous service in the industry.

Explanation.—In computing the number of days on which a workman has actually worked in an industry, the days on which—

(a) he has been laid-off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946, or under this Act or under any other law applicable to the industrial establishment, the largest number of days during which he has been laid-off being taken into account for the purposes of this clause;

(b) he has been on leave with full wages, earned in the previous year; and

(c) in the case of a female, she has been on maternity leave; so however that the total period of such maternity leave shall not exceed twelve weeks, shall be included."

Thus wherever, the provisions of the Industrial Disputes Act applied and the question of 'continuous service' became relevant, section 2 (eee) was referred to. But where the question of retrenchment or lay-off compensation arose, and 'one year of continuous service' was the material consideration, section 25-B was invoked.

The Supreme Court had occasion to consider the expression 'continuous service' in two of its recent decisions.

In *Messrs. Jeewanlal (1929) Ltd. v. Its workmen*,⁷ Clause 3 of an earlier award⁸ of an Industrial Tribunal came up for interpretation. Clause 3 had stipulated: "On voluntary retirement or resignation of an employee after 15 years' continuous service—gratuity at the same rate as above." The facts of the case were as follows: An employee who joined the appellant firm in 1929 submitted his resignation on 31st August, 1957. In the period of his service there was a break of 8½ months from February to October (1945), when he had remained absent from duty without permission or leave. Out of a claim for gratuity an Industrial dispute arose which was taken to the Labour Court, Bombay, which decided in favour of the employee. The appellant challenged the jurisdiction of the Labour Court, in the High Court of Bombay and questioned the order of the Labour Court. In the meantime, the Government of Bombay referred the question of interpretation of the term 'continuous service' contained in the said earlier award (which was in issue before the Labour Court) to the Industrial Tribunal.

6. Act No. XLIII of 1953.

7. (1961) 2 S.C.J. 559 : A.I.R. 1961 S.C. 1567.

8. The award given in 1951, by the Industrial Tribunal, pertained to a dispute between the appellant and their workmen, on certain demands made by the latter.

Before the Tribunal the employee claimed the benefit of Clause 3 of the said award and the gratuity amount accordingly as his case was one of resignation. The appellant contended that the employee was not in continuous service for the required period since there was a break of 8½ months which affected the continuity of his service, making his claim incompetent under the Clause 3 of the award. The Industrial Tribunal rejected this contention. The Tribunal held that the words 'continuous service' as used in the award in question meant 'service not broken or interrupted by the termination of the contract of employment by either the employer or the employee or by operation of law.'⁹

Before the Supreme Court, it was argued by the appellant that unauthorised absence from work should cause a break in service so that if an employee, after unauthorised absence from work, is allowed to resume work after such unauthorised absence he should not be entitled to claim continuous service in view of the break in service. To support, he canvassed the decision of the Supreme Court in *B. & C. Co., Ltd. v. Workers*^{9-a} where the Court decided that the period of illegal strike interrupted the continuity of service for the purposes of entitling a claim of holidays with pay under section 49-B (i) of the Indian Factories Act. But, the Supreme Court was of the view that "the meaning attributed to the words 'continuous service' in the context of the Factories Act may not have any material bearing in deciding the point in the present case". The Court also observed that "The same comment falls to be made in regard to the argument based on the definition of the expression 'continuous service' in section 2 (eee) of the Industrial Disputes Act, 1947"¹⁰ The Court proceeded to hold that "'continuous service' in the context of the scheme of gratuity framed by the Tribunal in the earlier reference postulates the continuance of the relationship of master and servant between the employer and his employees." If the servant resigns his employment, or if the employer terminates the service of his employee that brings the continuity of service to an end. If the service of an employee is brought to an end by the operation of any law that again is another instance where the continuance is disrupted; but it is difficult to hold that merely because an employee is absent without obtaining leave that itself would bring to an end the continuity of his service. Similarly, participation in an illegal strike which may incur the punishment of dismissal may not by itself bring to an end the relationship of master and servant..... mere participation in an illegal strike cannot be said to cause breach in continuity for the purposes of gratuity." On the other hand, "if an employee continues to be absent from duty without obtaining leave and in an unauthorised manner for such a long period of time that an inference may reasonably be drawn from such absence that by his absence he has abandoned service, then such long unauthorised absence may legitimately be held to cause a break in the continuity of service. It would thus always be a question of fact to be decided on the circumstances of each case whether or not a particular employee can claim continuity of service for the requisite period or not." The Court found in dismissing the appeal that the finding of the Tribunal was substantially correct in rejecting the contention that there was a break in the continuity of service, though there may be circumstances which warrant the inference that unauthorised absence amounted to abandoning of service which could constitute a break in service.

In this connection it is important to note the observation of the Court regarding the application of section 2 (eee) of Industrial Disputes Act. The Court observed: "..... This definition¹¹ is undoubtedly relevant in dealing with the

9. *M/s. Jeewanlal (1929) Ltd. v. Its workmen*, (1961) 2 S.C.J. 659 : A.I.R. 1961 S.C. 1567 at 1568.

9-a. (1953) S.C.J. 15 : (1953) 1 M.L.J. 191 : A.I.R. 1953 S.C. 47.

10. (1961) 2 S.C.J. 659 : A.I.R. 1961 S.C. 1567 at 1569.

11. Referring to definition of 'Continuous service' in section 2 (eee).

question of continuous service by reference to the provisions of the Industrial Disputes Act but its operation cannot be automatically extended in dealing with an interpretation of the words "continuous service" in an award made in an industrial dispute unless the context in which the expression is used in the award justifies it. In other words, the expression "continuous service" may be statutorily defined in which case the definition will prevail. An award using the said expression may itself give a definition of that expression and that will bind parties in dealing with claim arising from the award."¹²

In *Digwadih Colliery v. Their Workmen*,¹³ section 2 (eee) and sections 25-B and 25-F of the Industrial Disputes Act came for the consideration of the Supreme Court. The facts were that a workman who was working as badli, but who had completed 240 working days in a period of 12 calendar months, was discharged by the employer without notice or payment of wages in lieu of notice or compensation. The workman claimed that he was a permanent workman and therefore entitled to the benefit of section 25-F¹⁴, read with section 25-B¹⁵. The employer contended that the workman was temporary and that he had not fulfilled the two conditions of (a) continuous service, and (b) service for not less than one year; as the service was intermittently broken. In support, section 2 (eee) of the Act was canvassed before the Court. The Supreme Court expressed the view that "The definitions in section 2 of the Act do not apply if there is anything repugnant in the subject or context and the question is whether the definition of 'continuous service' can at all apply in considering section 25-F, when what is meant by the expression 'one year of continuous service' in section 25-F is by section 25-B specially stated.¹⁶ If section 25-B had not been enacted the contention of the employers would have been unanswerable, for the words of section 25-F would then have plainly meant that the service should be for a period of 12 months without interruptions other than those stated in section 2 (eee) itself." But section 25-B says that for the purposes of section 25-F a workman, who, in a period of 12 calendar months has actually worked for not less than 240 working days shall be deemed to have completed one year of continuous service. Service for 240 days in a period of twelve calendar months is equal not only to service for a year but is to be deemed continuous even if interrupted. "Therefore though section 25-F speaks of continuous service for not less than one year under the employer, both conditions are fulfilled if the workman has actually worked for 240 days during a period of twelve calendar months. It is not necessary to read the definition of continuous service into section 25-B because the fiction converts service of 240 days in a period of twelve calendar months into continuous service for one complete year."¹⁷

12. (1961) 2 S.C.J. 659 : A.I.R. 1961 S.C. 1567 at 1569.

13. (1965) 2 S.C.J. 864 : A.I.R. 1966 S.C. 75.

14. "25-F: *Conditions precedent to retrenchment of workmen*—No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until—

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of notice :

Provided that.....

(b) the workman has been paid, at the time of retrenchment, compensation, which shall be equivalent to fifteen days' average pay for every completed year of service or any part thereof in excess of six months ; and

(c) notice in the prescribed manner is served on the appropriate Government."

15. Refer, page 14.

16. i.e., As far as section 25-F is concerned, section 25-B alone is applicable and section 2 (eee) is not applicable. Therefore, section 2 (eee) is meant for other sections of the Act.

17. *Employers in relation to the Digwadih Colliery v. Their workmen*, (1965) 2 S.C.J. 864 : A.I.R. 1966 S.C. 75 at 77.

In the first case the Court maintained that unauthorised absence from work would, under certain set of fact-situations, constitute a break in service affecting the continuity of service, while in the second case it was held that service even though interrupted, could be deemed continuous and complete, if in a period of 12 calendar months the employees had worked 240 days for purposes of Retrenchment Compensation as contemplated under section 25-F by applying in the former case section 2 (eee) and in the latter section 25-B.

It must be noticed that in the latter case the Supreme Court has questioned the propriety of the applicability of section 2 (eee) to section 25-F, in the light of the special provision in section 25-B. Thus it necessarily leads to the conclusion that section 2 (eee) is meant for general application to the Statute as a whole excluding those special provisions for which a particular definition is supplied. Besides, the point remains as indicated by the Supreme Court that section 2 (eee) of the Industrial Disputes Act is relevant for cases that arise under that Statute and hence the definition of the expression 'continuous service' is a very important one as regards matters relating to employment conditions in the field of industrial relations.

The Amending Act of 1964¹⁸ introduced another change in the Statute. The sub-section (eee) was deleted from section 2, and section 25-B was amended to stand as follows:

"25-B. Definition of Continuous Service—For the purposes of this Chapter:

(1) A workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of Clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer—

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than—

(i) one hundred and ninety days in the case of a workman employed below ground in a mine; and

(ii) two hundred and forty days, in any other case;

(b) for a period of six months, if the workman, during a period of six calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than—

(i) ninety-five days, in the case of a workman employed below ground in a mine; and

(ii) one hundred and twenty days, in any other case.

Explanation.—For the purposes of Clause (2), the number of days on which a workman has actually worked under an employer shall include the days on which—

(i) he has been laid-off under an agreement or as permitted by Standing Orders under the Industrial Employment (Standing Orders) Act, 1946, or under this Act or under any other law applicable to the industrial establishment;

(ii) he has been on leave with full wages, earned in the previous year;

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and

18. Act No. XXXVI of 1964.

(iv) in the case of a female, she has been on maternity leave; so however, that the total period of such maternity leave does not exceed twelve weeks."

From the Amendments the following consequences follow:—

(1) For the purposes of the different provisions of the Act, barring Chapter V, the expression 'continuous service' stands undefined; (2) the definition of 'continuous service' as provided in section 25-B, though stands to be applicable to the whole of Chapter V-A, instead of to sections 25-C and 25-F alone does not materially alter the scope of application of the definition for the purposes of the Statute; (3) for the eligibility of retrenchment and lay-off compensations, the 'continuous service' required is reduced to a shorter period of six months.

From the foregoing analysis and discussion, it is evident that the question of 'continuous service' would arise in many a situation other than those contemplated under Chapter V of the Industrial Disputes Act—say where strike, lay-off and lock-out are concerned, to determine questions of compensation and gratuity and the many other benefits that accrue by virtue of employment, and long period of service. Though by the 1964 Amendment the application of section 25-B is extended to the whole Chapter as against its original limited scope prior to the amendment, the deletion of section 2 (eee) from the general definitions of the Statute, deprives the Statute of a well-defined criterion generally applicable. Before the Amendment of 1964, in spite of the narrow application of section 25-B the Statute had a definition of 'continuous service' in section 2 (eee) for aid and assistance, applicable to the whole sphere of Industrial matters coming under the Industrial Disputes Act. This, it is submitted, would tend to create more problems than that it sought to resolve.

In the light of the Supreme Court's observation that the Amending Act had only consolidated section 2 (eee) and section 25-B at one place¹⁹, and the provision of section 25-B as it stands, its applicability is limited to Chapter V. For the purposes of other sections of the Statute, wherever questions of 'continuous service' arise the Act is without a definition. Hence to facilitate clarity and to bring about uniformity in the interpretation and application of the provision of Labour Law it would be better to re-introduce section 2 (eee) as it stood prior to the Amendment of 1964.

19. *Employers in relation to the Digwadih Colliery v. Their workmen*, (1965) 2 S.C.J. 864 : A.I.R. 1966 S.G. 75 at 77.

[SUPREME COURT.]

V. Ramaswami, V. Bhargava, and
Raghubar Dayal, J.J.
14th September, 1966.

The Union of India v.
Bungo Steel Furniture (P.) Ltd.
C.A. Nos. 373 & 543 of 1965.

Arbitration—Arbitration Clause in Agreements—Claim for interest within the jurisdiction of the Arbitrator—Interest Act of 1839—Civil Procedure Code (V of 1908), section 34.

Applying the principle decided by the Judicial Committee in *Chamsey Bhara and Company v. Jivraj Balloo Spinning and Weaving Company, Ltd.*, L.R. (1923) 50 I.A. 324 : 44 M.L.J. 706 (P.C.) to the present case, "it is manifest that there is no error of law on the face of the award and the argument of the appellant on this aspect of the case must fail."

In *Bhowanidas Ramgobind v. Harasukhdas Balkishendas*, A.I.R. 1924 Cal. 524, the Division Bench of the Calcutta High Court consisting of Rankin and Mookerjee, JJ., held that the arbitrators had authority to make a decree for interest after the date of the award and expressly approved the decision of the English cases—*Edwards v. Great Western Railway*, (1851) 11 C.B. 588, *Sherry v. Oke*, (1835) 3 Dow 349 1 H.&W. 119, and *Beahan v. Wolfe* (1832) 1 Al. & Na. 233. The same view has been expressed by this Court in a recent judgment in *Firm Madanlal Roshanlal Mahajan v. The Hukumchand Mills, Ltd., Indore*, C.A. No. 878 of 1964, decided on 19th August, 1966. We are accordingly of the opinion that the arbitrator had authority to grant interest from the date of the award to the date of the decree of Mallick, J., and Mr. Bindra is unable to make good his argument on this aspect of the case.

N. S. Bindra, Senior Advocate (R. N. Sachthey, Advocate, with him), for Appellant.

A. K. Sen, Senior Advocate (Miss. Uma Mehta, and P. K. Chatterjee and P. K. Bose, Advocates, with him), for Respondent.

G.R.

Appeals dismissed.

[SUPREME COURT.]

K.N. Wanchoo, J.M. Shelat, and
G.K. Mitter, J.J.
15th September, 1966.

Ammathayi alias Perumalakal v.
Kumaresan alias Balakrishnan.
C.A. No. 618 of 1964.

Hindu Law—Gift to daughter-in-law out of ancestral immovable property—Can it be Stridhan Property—Evidence Act (1 of 1872), section 112.

Hindu law on the question of gifts of ancestral property is well settled. So far as movable ancestral property is concerned, a gift out of affection may be made to a wife, to a daughter and even to a son, provided the gift is within reasonable limits. A gift for example of the whole or almost the whole of the ancestral movable property cannot be upheld as a gift through affection : (See Mulla's Hindu Law, 13th Edition, page 252, para. 225). But so far as immovable ancestral property is concerned, the power of gift is much more circumscribed than in the case of movable ancestral property. A Hindu father or any other managing member has power to make a gift of ancestral immovable property within reasonable limits for "pious purposes." (See Mulla's Hindu Law, 13th Edition, para. 226, page 252). Now what is generally understood by "pious purposes" is gift for charitable and/or religious purposes. But this Court has extended the meaning of "pious purposes" to cases where a Hindu father makes a gift within reasonable limits of immovable ancestral property to his daughter in fulfilment of an antinuptial promise made on the occasion of the settlement of the terms of her marriage and the same can also be done by the mother in case the father is dead : (See *Kamala Devi v. Bachu Lal Gupta*, (1957) 1 M.L.J. (S.C.) 66 : (1957) 1 An.W.R. (S.C.) 66 : (1957) S.C.J. 321 : (1957) S.C.R. 452 : A.I.R. 1957 S.C. 434.

We have therefore no difficulty in holding that there is no warrant in Hindu law in support of the proposition that a father-in-law can make a gift of ancestral immovable property to a daughter-in-law at the time of her marriage. If that is so, we

cannot see how what the father-in-law himself could not do could be made into a pious obligation on the son as is claimed in this case, for that would be permitting indirectly what is not permitted under Hindu law directly. Further in any case gifts of ancestral immovable property can only be for pious purposes, and we doubt whether carrying out the directions of the father-in-law and making a gift in consequence can be said to be a gift for a pious purpose, specially when the father-in-law himself could not make such a gift. We are therefore of opinion that this gift cannot be upheld on the ground that Rangaswami Chettiar had merely carried out the wishes of his father indicated on the occasion of the marriage of Ammathayee.

Sarjoo Prasad, Senior Advocate (*M. S. Narasimhan*, Advocate, with him), for Appellants.

S. V. Gupte, Solicitor-General of India (*A. G. Rathaparkhi*, Advocate, with him), for Respondents Nos. 1 and 2.

R. Ganapathy Iyer, Advocate, for Respondent No. 3.

G.R.

Appeal dismissed.

[SUPREME COURT.]

K. N. Wanchoo, J. M. Shelat, and

G. K. Mitter, JJ.

30th November, 1966.

Subhas Chandra Das Mushib v.

Ganga Prasad Das Mushib.

C.A.No. 617 of 1964.

Contract Act (IX of 1872), section 16 (1) to (3)—Undue influence—Civil Procedure Code (V of 1908), Order 6, rule 4.

The law in India as to undue influence as embodied in section 16 of the Contract Act is based on the English Common Law as noted in the judgment of this Court in *Ladli Prasad Jaiswal v. Karnal Distillery Co., Ltd. and others*, (1964) 2 S.C.J. 12 : (1964) 1 S.C.R. 270 at 300. According to Halsbury's Laws of England, Third Edition, Volume 17, page 673, Article 1298, "Where there is no relationship shown to exist from which undue influence is presumed, that influence must be proved". Article 1299, page 674 of the same volume shows that "there is no presumption of imposition or fraud merely because a donor is old or of weak character". The nature of relations from the existence of which undue influence is presumed is considered at pages 678 to 681 of the same volume. The learned author notes at page 679 that "there is no presumption of undue influence in the case of a gift to a son, grandson, or son-in-law, although made during the donor's illness and a few days before his death". Generally speaking the relation of solicitor and client, trustee and *cestui que trust*, spiritual adviser and devotee, medical attendant and patient, parent and child are those in which such a presumption arises. Section 16 (2) of the Contract Act shows that such a situation can arise wherever the donee stands in a fiduciary relationship to the donor or holds a real or apparent authority over him.

Before however a Court is called upon to examine whether undue influence was exercised or not, it must scrutinise the pleadings to find out that such a case has been made out and that full particulars of undue influence have been given as in the case of fraud. See Order 6, Rule 4 of the Civil Procedure Code.

It will be noted at once that even the expression "undue influence" was not used in the issue. There was no issue as to whether the grandfather was a person of unsound mind and whether he was under the domination of the second defendant.

Once we come to the conclusion that the presumptions made by the learned Judges of the High Court were not warranted by law and that they did not take a view of the evidence adduced at the trial different from that of the Subordinate Judge on the facts of this case we must hold that the whole approach of the learned Judges of the High Court was wrong and as such their decision cannot be upheld.

Niren De, Additional Solicitor-General of India (*Sukumar Ghose*, Advocate, with him), for Appellant.

P. K. Chatterjee, Advocate, for Respondent No. 1.

G.R.

Appeal allowed

[SUPREME COURT.]

K. Subba Rao, C.J., M. Hidayatullah,
S. M. Sikri, V. Ramaswami and
J. M. Shelat, J.J.

16th September, 1966.

State of Uttar Pradesh v.
Raja Anand Brahma Shah.
C.As. Nos. 653-655 of 1964.

U.P. Zamindari Abolition and Land Reforms Act, 1950—Amendment of the word "Estate" by U.P. Zamindari Abolition and Land Reforms Amendment Act, 1963—Article 31-A (2) of the Constitution—U.P. Land Revenue Act, 1901.

If the State desires to invoke Article 31-A and rely on the definition contained in the first part of clause (a) it must show that the area sought to be acquired is an 'estate' within the definition contained in a law relating to land tenures passed before the commencement of the Constitution. The relevant definition for our purposes is contained in section 4 (4) of the U.P. Land Revenue Act, 1901. It is not necessary to decide whether Pargana Agori falls within the definition of 'Mahal' as we have come to the conclusion that Pargana Agori is a Jagir of Inam or a grant of a similar nature within clause (a) (i) of Article 31-A (2). But before giving our reasons for this conclusion we will dispose of the contention or the learned Counsel that Pargana Agori is an estate within clause (a) (iii) of that Article.

In our opinion the word 'including' is intended to clarify or explain the concept of land held or let for purposes ancillary to agriculture. The idea seems to be remove any doubts on the point whether waste land or forest land could be held to be capable of being held or let for purposes ancillary to agriculture.

We must, therefore, hold that forest land or waste land in the area in dispute cannot be deemed to be an estate within clause (a) (iii) unless it was held or let for purposes ancillary to agriculture. There is no dispute that the cultivated portion of Pargana Agori would fall within clause (a) (iii).

It seems to us that on the facts of the case the grant was in the nature of a grant similar to a Jagir or inam. The fact that Balwant Singh and Chet Singh held possession of this Pargana for 40 years cannot be ignored. This shows that to all intents and purposes Adil Shah had lost the Pargana and it was in effect a fresh grant in the nature of Jagir or inam for services rendered to the British. Adil Shah's assertion to title had not been verified. Although it may be one of the reasons for the grant, it is clear that if it had not been for the grant and its enforcement by the British Troops Adil Shah would not have been able to recover the possession of the Pargana. His title to the Pargana would rest on the grant and not the alleged previous title.

If it is held, as we do hold, that the area in dispute is a grant in the nature of Jagir or inam and consequently an estate within Article 31-A (2), the impugned Act can claim the protection of Article 31-A. The notifications dated 30th June, 1953 and July, 1953, must therefore be upheld.

In this view it is not necessary to decide whether the area in dispute is a Mahal or covered by a 3 (8) of the Reforms Act as it existed in 1958 or earlier or any other question which was raised before us.

In the result the appeals filed by the State are accepted, the appeal filed by the petitioner Raja is dismissed and the petition under Article 226 filed by the petitioner Raja is dismissed. In the circumstances of the case there will be no order as to costs.

C. K. Daphtary, Attorney-General for India and Shanti Bhushan, Additional Advocate-General for the State of U.P. (O. P. Rana, Advocate, with them), for Appellants (in C.As. Nos. 653 and 654 of 1964) and Respondents (in C.A. No. 655 of 1964).

A. K. Sen and B. R. L. Iyengar, Senior Advocates (V. P. Misra, S. K. Mehta and K. L. Mehta, Advocates, with them), for Respondent (In C.As. Nos. 653 and 654 of 1964) and the Appellant (In C.A. No. 655 of 1964).

G.R.

Appeals by State accepted

[SUPREME COURT.]

K. Subba Rao, C.J.,
M. Hidayatullah, S. M. Sikri,
V. Ramaswami and
J. M. Shelat, JJ.
16th September, 1966.

Raja Anand Brahma Shah v.
State of Uttar Pradesh.
C.A. No. 656 of 1964.

Land Acquisition Act (I of 1894), sections 4, 5-A, 6, 7, 17, 18—Public purpose—Meaning of 'waste land'.

It is not necessary for us to express any concluded opinion as to whether the production of cement as a commercial enterprise is a public purpose within the meaning of the Act for we consider that the principle of the decision of this Court in *Smt. Somavanti v. The State of Punjab*, (1963) 2 S.C.R. 774 : (1963) 2 An.W.R. (S.C.) 18 : (1963) 2 M.L.J. (S.C.) 18 : (1963) 2 S.C.J. 35 : A.I.R. 1963 S.C. 151, applies to this case and the argument of the appellant must be rejected because he has not been able to show that the action of the Government in issuing the notification under section 6 of the Act is a colourable exercise of power.

It follows therefore that section 17 (1) of the Act is not attracted to the present case and the State Government had therefore no authority to give a direction to the Collector to take possession of the lands under section 17 (1) of the Act. In our opinion, the condition imposed by section 17 (1) is a condition upon which the jurisdiction of the State Government depends and it is obvious that by wrongly deciding the question as to the character of the land the State Government cannot give itself jurisdiction to give a direction to the Collector to take possession of the land under section 17 (1) of the Act. It is well established that where the jurisdiction of an administrative authority depends upon a preliminary finding of fact the High Court is entitled, in a proceeding of writ of *certiorari* to determine upon its independent judgment, whether or not that finding of fact is correct (See *R. v. Shore-ditch Assessment Committee*, L.R. (1910) 2 K.B. 859 and *White and Collins v. Minister of Health*, L.R. (1939) 2 K.B. 838).

We are accordingly of the opinion that the direction of the State Government under section 17 (1) and the action of the Collector in taking possession of the land under that sub-section is *ultra vires*.

If therefore in a case the land under acquisition is not actually waste or arable land but the State Government has formed the opinion that the provisions of sub-section (1) of section 17 are applicable, the Court may legitimately draw an inference that the State Government did not honestly form that opinion or that in forming that opinion the State Government did not apply its mind to the relevant facts bearing on the question at issue. It follows therefore that the notification of the State Government under section 17 (4) of the Act directing that the provision of section 5-A shall not apply to the land is *ultra vires*. The view that we have expressed is borne out by the decision of the Judicial Committee in *Estate and Trust Agencies* (1927), *Ltd. v. Singapore Improvement Trust*, L.R. (1937) A.C. 898.

We accordingly hold that the appellant has made good his submission on this aspect of the case and the notification of the State Government under section 6 of the Act dated 12th December, 1950 is *ultra vires* and therefore all the proceedings taken by the Land Acquisition Officer subsequent to the issue of the notification under section 6 must be held to be illegal and without jurisdiction.

For the reasons already expressed we hold that the State Government has no jurisdiction to apply the provisions of section 17 (1) and (4) of the Act to the land in dispute and to order that the provisions of section 5-A of the Act will not apply to the land. We are further of the opinion that the State Government had no jurisdiction to order the Collector of Mirzapur to take over possession of the land under section 17 (1) of the Act. The notification dated 4th October, 1950 is therefore illegal. For the same reasons the notification of the State Government under section 6 of the Act, dated 12th December, 1950 is *ultra vires*.

We accordingly hold that a writ in the nature of *certiorari* should be granted quashing the notification of the State Government dated 4th October, 1950 by which the Governor has applied section 17 (1) and (4) to the land in dispute and directed that the provisions of section 5-A of the Act should not apply to the land. We further order that the notification of the State Government dated 12th December, 1950 under section 6 of the Act and also further proceedings taken in the land acquisition case after the issue of the notification should be quashed including the award dated 7th January, 1952 and the reference made to civil Court under section 18 of the Act.

B. R. L. Iyengar, Senior Advocate (*V. P. Misra*, *S. K. Mehta* and *K. L. Mehta* Advocates, with him), for Appellant.

C. K. Daphtary, Attorney-General for India and *Shanti Bhushan*, Additional Advocate-General for the State of U.P. (*O. P. Rana*, Advocate, with them), for Respondents Nos. 1 and 2.

G.R.

Appeal partly allowed.

[SUPREME COURT.]

K. Subba Rao, C.J., *M. Hidayatullah*,
S. M. Sikri, J. *M. Shelat*
and *G. K. Mitter*, JJ.
20th September, 1966.

Meghraj Kothari v.
The Delimitation Commission.
C.A. No. 843 of 1966.

Delimitation Commission Act, (LXI of 1962), section 10 (1)—Articles 82, 327 and 329 of the Constitution—Representation of People Act, 1951.

In our view, the objection to the delimitation of constituencies could only be entertained by the Commission before the date specified. Once the orders made by the Commission under sections 8 and 9 were published in the Gazette of India and in the official gazettes of the States concerned, these matters could no longer be reagitated in a Court of law. There seems to be very good reason behind such a provision. If the orders made under sections 8 and 9 were not to be treated as final, the effect would be that any voter, if he so wished, could hold up an election indefinitely by questioning the delimitation of the constituencies from Court to Court. Section 10 (2) of the Act clearly demonstrates the intention of the Legislature that the orders under sections 8 and 9 published under section 10 (1) were to be treated as law which was not to be questioned in any Court.

In this case it must be held that the orders under sections 8 and 9 published under section 10 (1) of the Delimitation Commission Act were to make a complete set of rules which would govern the readjustment of number of seats and the delimitation of constituencies.

In this case the powers given by the Delimitation Commission Act and the work of the Commission would be wholly nugatory unless the Commission as a result of its deliberations and public sittings were in a position to readjust the number of seats in the House of the People or the total number of seats to be assigned to the Legislative Assembly with reservation for the Scheduled Castes and Scheduled Tribes and the delimitation of constituencies. It was the will of Parliament that the Commission could by order publish its proposals which were to be given effect to in the subsequent election and as such its order as published in the notification of the Gazette of India or the Gazette of the State was to be treated as law on the subject.

In the instant case the provision of section 10 (2) of the Act puts orders under sections 8 and 9 as published under section 10 (1) in the same status as a law made by Parliament itself which, as we have already said, could only be done under Article 327, and consequently the objection that the notification was not to be treated as law cannot be given effect to.

G. N. Dikshit, *K. L. More* and *R. N. Dixit*, Advocates, for Appellant.

Niren De, Additional Solicitor-General of India (*R. Ganapathy Iyer*, *R. H. Dhebar* and *B. R. G. K. Achar*, Advocates, with him), for Respondents Nos. 1 to 4 and 14.

S. S. Shukla, Advocate, for Respondent No. 5.

G.R.

Appeal dismissed.

[SUPREME COURT.]

K. Subba Rao, C.J.,
M. Hidayatullah,
S. M. Sikri, J. M. Shelat and
G. K. Mitter, JJ.
21st September, 1966.

The State of Assam v.
Rana Muhammad.
C.As. Nos. 1367-1368 of 1966.

Constitution of India (1950), Articles 233 and 235—Interpretation—Power to transfer District Judges lies with the Government or with the High Court.

As the High Court is the authority to make transfers, there was no question of a consultation on this account. The State Government was not the authority to order the transfers. There was, however, need for consultation before *D. N. Deka* was promoted and posted as a District Judge. That such a consultation is mandatory has been laid down quite definitely in the recent decision of this Court in *Chandra Mohan v. State of U. P.*, A.I.R. 1966 S.C. 1987. On this part of the case it is sufficient to say that there was no consultation.

Purshottam Trikumdas and A. K. Sen, Senior Advocates (*Naurit Lal and Vineet Kumar*, Advocates, with them), for Appellant.

Sarjoo Prasad, Senior Advocate (*Vinoo Bhagat and S. N. Prasad*, Advocates, with him), for Respondent No. 4.

G.R.

Appeals dismissed.

[SUPREME COURT.]

K. Subba Rao, C.J., M. Hidayatullah,
S. M. Sikri, J. M. Shelat and
G. K. Mitter, JJ.
21st September, 1966.

P. L. Lakhanpal v.
The Union of India.
W.P. No. 137 of 1966.

Defence of India Rules, rule 30 (i) (b) ultra vires section 3 (2) (15) (i) of the Defence of India Act, 1962—Defence of India (Delhi Detenuees) Rules, 1964, rule 23—Mala fide order—Right of Representation under section 44 of the Act—Meaning of word 'decide'—Preventive Detention Act.

The question is: what precisely does the word "decide" in rule 30-A mean? It is no doubt a popular and not a technical word. According to its dictionary meaning "to decide" means "settle (question, issue, dispute) by giving victory to one side; give judgment (between, for, in favour of, against); bring, come, to a resolution" and "decision" means "settlement, (of question etc.), conclusion, formal, judgment, making up one's mind, resolve, resoluteness, decided character." As *Fazl Ali, J.*, observed in *Province of Bombay v. Advani*, (1950) S.C. R. 621 at 642: (1950) 2 M.L.J. 703: (1950) S.C.J. 451: A.I.R. 1950 S.C. 222:

The scheme of rules 30 (1) and 30-A is totally different from that of the Preventive Detention Act. Where an order is made under rule 30 (1) (b) its review is at intervals of periods of not more than six months. The object of the review is to decide whether there is a necessity to continue the detention order or not in the light of the facts and circumstances including any development that has taken place in the meantime. If the reviewing authority finds that such a development has taken place in the sense that the reasons which led to the passing of the original order no longer subsist or that some of them do not subsist, that is not to say that those reasons did not exist at the time of passing the original order and therefore the satisfaction was on grounds which did not then exist. It is easy to visualise a case where the

authority is satisfied, that an order of detention is necessary to prevent a detenu from acting in a manner prejudicial to all the objects set out in rule 30 (1). - At the end of six months the reviewing authority on the materials before it may come to a decision that the detention is still necessary as the detenu is likely to act in a manner prejudicial to some but not all the matters. Provided such decision is arrived at within the scope of rule 30-A the decision to continue the detention order would be sustainable. There is thus no analogy between the provisions of review in the two Acts and therefore decisions on the Preventive Detention Act cannot be availed of by the petitioner.

As regards the contention as to *mala fides* it will be observed that the original order was passed by the Union Home Minister while the order under rule 30-A was passed by the Minister of State of Home Affairs. The first part of the contention has already been rejected by this Court in the petitioner's earlier Writ Petition and therefore cannot be reagitated.

Petitioner in Person.

S. V. Gupte, Solicitor-General of India (R. H. Dhebar and B. R. G. K. Achar, Advocates, with him), for Respondents.

G.R.

Petition dismissed.

[SUPREME COURT.]

K. N. Wanchoo, J. M. Shelat
and G. K. Mitter, JJ.

State of Assam v.
Kiipanath Sarma.

23rd September, 1966.

C.As. Nos. 950-957, 1141-1143 and
1703-1712 of 1966.

Assam Primary Education Act (XIII of 1947) repealed by Assam Basic Education Act (XXVI of 1954) (hereinafter referred to as 1954 Act) also repealed by Assam Elementary Education Act, XXX of 1962 (hereinafter referred to as the Act)—Article 311 (2) of the Constitution—General Clauses Act (X of 1897)—Assam General Clauses Act II of 1915.

We are in agreement with the High Court though for slightly different reasons, that the services of the respondent-teachers could not be terminated by the Assistant Secretary of the State Board under section 14 (3) (iii) of the Act read with section 18 of the 1915 Act.

This brings us to the alternative argument, namely, whether the respondents have been dismissed by the State Board.....

The question that arises therefore is whether the said resolution can be said to have terminated the services of anyone at all. It certainly begins by saying that "all teachers who are not matriculates or who have not passed the Teachers' Test but who are working as teachers in schools shall be discharged with effect from 31st March, 1963". It is not in dispute that at the time when this resolution was passed there was no list of teachers who were not matriculates or who had not passed the Teachers' Test before the State Advisory Board. So the resolution in our opinion cannot be read as amounting to terminating anyone's service and must only be read as laying down principles which would have to be applied for dispensing with the services of certain teachers from 31st March, 1963 if conditions mentioned in the resolution are satisfied. Legally, a resolution like this cannot be read as an order dismissing persons whose names were not even known to the authority passing it. If this resolution really amounted to an order of discharge of particular persons, it should have been communicated to them, for without such communication it would be of no use for the purpose of terminating the services of anybody (see *Bachittar Singh v. The State of Punjab*, (1962) 3 Suppl. S.C.R. 713 : A.I.R. 1963 S.C. 395). It is not in dispute that this resolution was not communicated to any teacher as such and obviously it could not be communicated to any teacher who might even be governed by its terms for the State Advisory Board did not know to which particular teachers it might or might not apply. It must therefore be read not as an order terminating the services of anybody but as an indication of policy to be pursued for discharge of teachers as from 31st March, 1963.

Therefore the orders issued in the present case terminating the services of the respondent-teachers were invalid, for they were not orders of the State Board terminating the services of the respondents; they must be held to be orders of the Assistant Secretary who had no power to terminate the services of the respondents.

S. V. Gupta, Solicitor-General of India (*Naunit Lal*, Advocate, with him), for Appellant (In C.As. Nos. 950-957 of 1966).

Naunit Lal, Advocate, for Appellants (In C.As. Nos. 1141-1143 and 1703-1712 of 1966).

Hareshwar Goswami, *K. Rajendra Chaudhury* and *K. R. Chaudhury*, Advocates, for Respondent No. 1 (In C.A. No. 950 of 1966).

K. Chaudhury, Advocate (*K. Rajendra Chaudhury*, Advocate with him), for Respondent No. 1 (In C.As. Nos. 952 and 953 of 1966).

D. N. Mukherjee, Advocate, for Respondent No. 1 (In C.A. No. 1142 of 1966) and Respondents 2 to 9, 10, 11, 13 to 18, 20 to 22, 24, 26 and 27 in C.A. No. 1143 of 1966.

Vineet Kumar, Advocate, for Respondent No. 2 (In C.As. Nos. 950-957 of 1966).

G.R.

Appeals dismissed.

[SUPREME COURT.]

M. Hidayatullah, *S. M. Sikri*,
R. S. Bachawat and *Raghubar Dayal*, JJ.
23rd September, 1966.

The State of Assam v.
Horizon Union.
C.A. No. 1565 of 1966.

Industrial Disputes Act (XIV of 1947), Amendment by Act (XXXVI of 1956)—Assam Act VIII of 1962—Industrial Disputes Amendment Act (XXXVI of 1964)—Assam Judicial Service (Senior) Rules, 1952.

We are satisfied that during the period from 8th March, 1957 upto 24th April, 1958, Shri Dutta, while officiating as a Registrar of the High Court, continued to hold the office of an Additional District Judge. Consequently, during this period he had been an Additional District Judge as required by section 7-A (3) (aa). To satisfy the requirement of section 7-A (3) (aa) it was not necessary that he must have actually worked as an Additional District Judge for this period. The High Court was in error in thinking that in order to satisfy the conditions of section 7-A (3) (aa), Shri Dutta should have actually worked as an Additional District Judge for a period of not less than three years.

The appointment of Shri Dutta as the Presiding Officer of the Industrial Tribunal was made without consultation with the High Court. Respondent No. 1 submitted that, consequently, there was no compliance with the proviso to section 7-A (3) (aa) inserted by Assam Act VIII of 1962. This contention has no force. In respect of the subject-matter of the appointment of a person who has for a period of not less than three years been a District Judge or an Additional District Judge, clause (aa) inserted by Central Act XXXVI of 1964 impliedly repealed clause (aa) inserted by the Assam Act. Clause (aa) inserted by the Central Act is intended to be an exhaustive code in respect of this subject-matter. The Central Act now occupies this field. The provisions of clause (aa) inserted by the Assam Act on this subject are repugnant to clause (aa) inserted by the Central Act and by Article 254 of the Constitution to the extent of this repugnancy, is void. Clause (aa) of section 7-A (3) inserted by the Central Act does not require any consultation with the High Court.

M. C. Setalvad, Senior Advocate (*Naunit Lal*, Advocate, with him), for Appellant.

D. Goburdhan, Advocate, for Respondent No. 2.

G.F

Appeal allowed.

K. Subba Rao, C.J.
M. Hidayatullah,
S. M. Sikri, R. S. Bachawat
and Raghubar Dayal, JJ.
26th September, 1966.

M/s. Shinde Brothers v.
The Deputy Commissioner, Raichur.
C.As. Nos. 1580-1586, 1588 and 1590-1600 of 1966.

Mysore Health Cess Act (Mysore Act XXVIII of 1962)—Mysore Excise Act (V of 1901)—Hyderabad Abkari Act (I of 1316 Fasli)—Madras Abkari Act, 1886 (Madras Act I of 1886)—Meaning of word "excise duty" "Countervailing duty", "Abkari Revenue", "Sale" or "Selling", "Manufacture", "Excisable Article", "Arrack."—Entry 51, List II of the Constitution.

By Majority.—The health cess sought to be levied under the impugned Act on shop rent does not fall within item 1 of Schedule A of the Impugned Act or Entry 51, List II of the Constitution.

No notification or notifications issued under section 3 were placed before us. We are, therefore, unable to say whether the levy of the Health Cess under the Act of 1951 stands on the same basis. Further no particulars are given in the petitions as to the dates of payments and no reason is given why the levy of Health Cess under the Act of 1951 was not challenged earlier. In the circumstances we decline to adjudge on the validity of the Health Cess Act, 1951, and the notifications issued under it. The petitioners will, however, be at liberty to file suits, if so advised, to recover the amounts alleged to have been paid by them under the Health Cess Act, 1951.

In the result the appeals are allowed and it is declared that the State of Mysore had no authority to levy and collect health cess under the Mysore Health Cess Act, 1962, on shop rent, and an order or direction in the nature of writ of *mandamus* be issued restraining the respondents from enforcing the demand for payment of health cess under the impugned Act, and further an order be issued directing the respondents to refund the health cess illegally collected under the Health Cess Act, 1962. There would be no order as to costs.

D. R. Venkatesa Iyer, Advocate and O. C. Mathur, J. B. Dadachanji and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co., for Appellants (In C.As. Nos. 1580 to 1586 and 1588 of 1966).

M. K. Nambyar, Senior Advocate (D. R. Venkatesa Iyer, Advocate and O. C. Mathur, J. B. Dadachanji and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co., with him), for Appellants (In C.As. Nos. 1590-1594, 1596 and 1599-1600 of 1966).

M. C. Setalvad, Senior Advocate (D. R. Venkatesa Iyer, Advocate and O. C. Mathur, J. B. Dadachanji and Ravinder Narain, Advocates, of M/s. J. B. Dadachanji & Co., with him), for Appellants (In C.As. Nos. 1597 and 1598 of 1966).

K. R. Chandhury, S. P. Satyanarayana Rao and K. Rajendra Chaudhuri, Advocates, for Appellant (In C.A. No. 1595 of 1966).

R. H. Dhebar, Advocate, for Respondents (In C.As. Nos. 1580 to 1586, 1588 and 1595 of 1966).

H. R. Gokhale and B. R. I. Iyengar, Senior Advocates (R. H. Dhebar, Advocate, with them), for Respondent (In C.As. Nos. 1590 to 1600 of 1966).

G.R.

Appeal allowed.

[SUPREME COURT.]

K. Subba Rao, C.J., M. Hidayatullah,

Gulabbhai Vallabbhai Desai v.

S.M. Sikri, V. Ramaswami and

The Union of India.

J. M. Shelat, J.J.

W.P. Nos. 148, 149, 233 and 238 of

27th September, 1966.

1962, and 216 of 1963.

Constitution (Twelfth Amendment) Act, 1962—First Schedule to the Constitution Amendment of Entry 7, Article 240 of the Constitution—Goa, Daman and Diu (Administration) Ordinance, 1962—Articles 14, 19 and 31 and 31-A of the Constitution—Legislative Enactment No. 1785 of 1896 amended by Legislative Enactment No. 1791 of 1958—The Portuguese Civil Code.

The difficulty in the present case is that all the constitutional amendments have come with retrospective effect. The Seventeenth Amendment replaces Article 31-A with modifications retrospectively from 26th January, 1950. It is not, therefore, possible to read Article 31-A in any manner other than that indicated by the Seventeenth Amendment. It is also not possible to say that the President in the 13th year of the Republic of India anticipated what Parliament would introduce retrospectively into the Constitution in the 15th year of the Republic. The President cannot, therefore, be said to have been cognizant of the limits of his own power in 1962 when he made the Regulation and to have made it accord with the definition of 'estate' in Article 31-A. In this connection it is not possible to compare the definition of 'land' in the Regulation with the definition of 'estate' as given in the earlier versions of Article 31-A because by the force of the Seventeenth Amendment the earlier version of the article completely disappears and may be said to have never existed at all. The result, therefore, is that the definition of 'land' in the Regulation being at variance with the definition of 'estate' cannot stand with it. But as it is severable it does not affect the operation of the Regulation which will operate but the protection of Article 31-A will not be available in respect of land not strictly within the definition of Article 31-A. In other words, 'land' would include not every class or category of land but only lands held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pastures or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans. Land which does not answer this description is not protected from an attack under Articles 14, 19 and 31 and it is from this point of view that the cases of the petitioners before us must be examined where categories of land other than those stated in Article 31-A (2) (a) (iii) are mentioned.

A. K. Sen, Senior Advocate (R. J. Joshi, B. Dutta and Dalip M. Desai, Advocates, and J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co. with him), for Petitioner (In W.P. No. 148 of 1962).

Purshottam Trikumdas, Senior Advocate (R. J. Joshi, B. Dutta and Dalip M. Desai, Advocates, and J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co., with him), for Petitioner (In W.P. No. 149 of 1962).

R. J. Joshi and B. Dutta, Advocates, and J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co., for Petitioners (In W.P. Nos. 233 and 238 of 1962).

Purshottam Trikumdas, Senior Advocate (B. Dutta, Advocate, and J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co., with him), for Petitioners (In W.P. No. 216 of 1963).

C. K. Daphtary, Attorney-General for India and N. S. Bindra, Senior Advocate, (R. H. Dhebar and B. R. G. K. Achar, Advocates, with them), for Respondent No. 1 (In all the Petitions).

C.B.

Order accordingly.

[SUPREME COURT.]

*K. Subba Rao, C.J.,
M. Hidayatullah,
S. M. Sikri,
R. S. Bachawat and
Raghubar Dayal, JJ.*
30th September, 1966.

*Samyukta Socialist Party v.
Election Commission of India.*
C.A. No. 1653 of 1966.
*Madhu Limaye v.
Election Commission of India.*
W.P. No. 193 of 1966.

Election Symbol 'Hut' and 'Tree'—Conduct of Elections Rules, 1961, rule 5.

The question is whether the Election Commission acted capriciously or without jurisdiction. We think the facts support the action of the Election Commission and also that it was within its jurisdiction. If the Praja Socialist Party, after the break-up, was a new party or had a new leadership then the symbol, which originally belonged to the defunct Praja Socialist Party, could not be claimed by the new Praja Socialist Party as a matter of right, but if it was the same party with the same leaders which contested the earlier elections with the symbol of 'Hut' there was complete justification in restoring the party to its original position so that the advantage of a symbol identified with a party should not be lost to it. Although we are clear that a change of symbol by the Election Commission arbitrarily would be outside its competency, because the Rules framed by the Central Government and supplemented by the Election Commission in its Notification do not contemplate a discretion in the Election Commission, there is some jurisdiction in the Election Commission to regulate or restrict the choice of symbols in circumstances such as this. Although no power is given to the Election Commission to impose its own wishes on parties or candidates, it can, in a suitable case, restore the lost advantage to a party before the symbol can be said to be finally assigned to another party. Can we, therefore, say, in this case, that the Election Commission imposed its will arbitrarily or capriciously on the Samyukta Socialist Party when it took away the symbol of 'Hut' from it? On a careful consideration of the correspondence between the Election Commission on the one hand, and the Praja Socialist Party on the other, and taking into consideration all available facts, we are satisfied that the action of the Election Commission was within its jurisdiction when it recognized the choice of the symbol by the Praja Socialist Party and cannot be described as an interference with the choice of the Samyukta Socialist Party.

To begin with the action is *bona fide*, for no malice or any other improper motive has even been suggested.

It is clear, therefore, that the Election Commission proceeded along the right lines and reached the right conclusion both legally and in the light of the facts ascertained by it from impartial sources. We see no force in the appeal and it will be dismissed but we make no order as to costs.

H. R. Gokhale, Senior Advocate (*J. P. Goyal*, Advocate, with him), for Appellant and Petitioner.

N. S. Bindra, Senior Advocate (*R. H. Dhebar*, Advocate, with him), for Respondent No. 1 (In C.A. No. 1653 of 1966) and Respondents Nos. 1 and 3 (In W.P. No. 193 of 1966).

Purshottam Triकुन्दas, Senior Advocate (*T. R. Bhasin*, *S. C. Malik*, *S. K. Mehta* and *K. L. Mehta*, Advocates, with him), for Respondent No. 2 (In C.A. No. 1653 of 1966 and W.P. No. 193 of 1966).

G.R.

Appeal and Petition dismissed.

[SUPREME COURT.]

Bungo Steel Furniture (P.), Ltd. v.
The Union of India.
C.As. Nos. 754 and 755 of 1964.

V. Ramaswami,
V. Bhargava and
Raghubar Dayal, JJ.
30th September, 1966.

Contract Act (IX of 1872), section 73—Sale of Goods Act (III of 1930), section 55—Award of Arbitrator.

By majority.—The High Court, in setting aside the award, was of the view that in dealing with compensation payable by the Government to the appellant the learned Umpire had acted contrary to the principles recognised in law for assessing compensation. In our view, considering the principles which apply to the exercise of the power of a Court to set aside an award of an arbitrator, this order by the High Court was not justified.

It is now a well-settled principle that if an arbitrator, in deciding a dispute before him, does not record his reasons and does not indicate the principles of law on which he has proceeded, the award is not on that account vitiated. It is only when the arbitrator proceeds to give his reasons or to lay down principles on which he has arrived at his decisions that the Court is competent to examine whether he has proceeded contrary to law and is entitled to interfere if such error in law is apparent on the face of the award itself.

In the circumstances, it has to be held that the Umpire, in fixing the amount of compensation, had not proceeded to follow any principles, the validity of which could be tested on the basis of laws applicable to breaches of contract. He awarded the compensation to the extent that he considered right in his discretion without indicating his reasons. Such a decision by an Umpire or an Arbitrator cannot be held to be erroneous on the face of the record. We, therefore, allow the appeals with costs, set aside the appellate order of the High Court, and restore that of the learned Single Judge.

A. K. Sen, Senior Advocate (Uma Mehta, P. K. Chatterjee and P. K. Bose, Advocates, with him), for Appellant.

N. S. Bindra, Senior Advocate (R. N. Sachthey, Advocate, with him), for Respondent.

G.R.

Appeals allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J.C. SHAH, V. RAMASWAMI AND V. BHARGAVA, JJ.

Commissioner of Income-tax, Gujarat

.. Appellant*

v.

Girdhardas & Company Private, Ltd.

.. Respondent.

Income-tax Act, (XI of 1922), section 2 (6-A) clause (c) (as amended by Finance Act, 1956)—Dividend—Company in liquidation—Accumulated profits existing on date of liquidation—Distribution by liquidator—Amount over and above accumulated surplus—Subsequent distributions—If deemed dividend—Whether and to what extent attributable to accumulated profits.

The respondent company was voluntarily wound up by a resolution dated 23rd August, 1952, and a liquidator was appointed. On the commencement of the winding-up the paid-up capital of the company was Rs. 25 lakhs and the accumulated profits amounted to Rs. 5,34,041. Even in September, 1952, the liquidator distributed Rs. 17,25,000 to the shareholders. Out of the said amount Rs. 52,400 only was treated as dividend under section 2 (6-A) (c) of the Income-tax Act, 1922 (as it then stood) and tax was levied thereon. Further distributions were made in the succeeding years, and in 1956-57 Rs. 75,000 was distributed to the shareholders. The Income-tax Officer in the assessment year 1958-59 treated the whole of it as dividend under section 2 (6-A) (c) as amended by the Finance Act, 1956 and assessed the same to tax. The assessment was confirmed on appeal by the Assistant Commissioner. It was contended by the liquidator in appeal to the Appellate Tribunal that (i) the entire accumulated profits was exhausted when in September, 1952, Rs. 17,25,000 was distributed and there was no accumulated profit thereafter in the hands of the liquidator, and (ii) in the event that whenever distribution was made by him of the assets in his hands accumulated profits and the capital should be deemed as distributed, then it must be in the same proportion in which the accumulated profits and the capital stood at the date of liquidation.

The Tribunal held against the first objection and did not decide the second: but the question, whether the said sum of Rs. 75,000 or any part thereof aforesaid could be treated as dividend under section 2 (6-A) (c) was referred to the High Court of Bombay, which was ultimately disposed of by the High Court of Gujarat. It answered the question in the negative. Hence this appeal to the Supreme Court,

Held : The reason for insertion of section 2 (6-A) (c) was that on a winding up of a company the distinction between the assets and undistributed profits disappears vide *Commissioners of Inland Revenue v. George Burrell*, L.R. (1942) 2 K.B. 52, 63. The amount distributed by the liquidator is distributed only as capital assets of the company which is not taxable as income under the law as it then stood.

The inclusive definition of "dividend" in section 2 (6-A) (c) inserted in 1939 was devised to include therein distribution of accumulated profits of the company on its liquidation subject to certain limitations.

The language of section 2 (6-A) (c) as amended by Finance Act, 1956 is fairly clear. Even though on a winding up the distinction between accumulated profits and assets disappears, the taxing authorities may disintegrate the amount distributed into its component parts and determine the share attributable to accumulated profits.

The Income-tax Officer has, therefore, in the first instance to determine the accumulated profits in the accounts of the company whether capitalised or not, and the rest of the capital assets immediately before liquidation: he has then to determine the ratio between such capital assets and undistributed profits and apply the ratio to the amount distributed to determine the component attributable to accumulated profits.

The fund in the hands of the liquidator is one: when the fund or a part of it is distributed such distribution is deemed to take place in the same proportion in which the capital and accumulated profits stood in the accounts of the company immediately before winding up.

That part of Rs. 75,000 which bears the same ratio to Rs. 75,000 which the accumulated profits at the date of liquidation bore to the total assets of the company before liquidation is "dividend" in the instant case.

Appeal from the Judgment and Order dated the 22nd June, 1964 of the Gujarat High Court in Income-tax Reference No. 10 of 1963.

B. Sen, Senior Advocate, (*T.A. Ramachandran* and *R.N. Sachthey*, Advocates, with him), for Appellant.

S.T. Desai, Senior Advocate, (*I.N. Shroff*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Shah, J.—By a resolution dated 23rd August, 1952, it was resolved to wind up the respondent company and to appoint a liquidator for that purpose. The paid-up capital of the assessee was Rs. 25 lakhs, and on the date of commencement of winding up it had an accumulated profit of Rs. 5,34,041. From time to time the liquidator distributed the assets in his hands among the shareholders. The following table sets out the distributions made by the liquidator :

<i>Assessment Year.</i>	<i>Distribution per share.</i>	<i>Date of distribution.</i>	<i>Amount distributed.</i>
1953—54	Rs. 600	9—9—1952	15,00,000
„	Rs. 90	25—9—1952	2,25,000
1954—55	Rs. 60	10—11—1952	1,50,000
„	Rs. 30	6—5—1953	75,000
„	Rs. 30	23—2—1953 (<i>sic.</i>)	75,000
1955—56	Rs. 80	10—11—1953	2,00,000

Out of the distribution made on 9th September, 1952, the Income-tax Officer brought, in the assessment year 1953-54, to tax Rs. 52,400 as "dividend" within the meaning of section 2 (6-A) (c) of the Income-tax Act, 1922, as it then stood. On 24th July, 1957, the liquidator distributed Rs. 30 per share among the shareholders. The Income-tax Officer in the course of assessment for the year 1958-59 sought to bring the entire amount of Rs. 75,000 distributed to tax as "dividend" within the meaning of section 2 (6-A) (c) of the Income-tax Act as amended by the Finance Act, 1956. The objections raised by the liquidator were rejected and the amount was brought to tax. The Appellate Assistant Commissioner confirmed the order of the Income-tax Officer. In appeal to the Tribunal on behalf of the assessee, it was urged that the entire accumulated profit was exhausted when Rs. 17,25,000 were distributed in the year 1952 and thereafter there were no accumulated profits in the hands of the liquidator which could be distributed ; and that in any event whenever distribution is made of the assets in the hands of the liquidator, accumulated profits and the capital must be deemed to be distributed in the same proportion in which the accumulated profits and the capital stood at the date of liquidation. The Tribunal rejected the first contention and did not consider the second.

The Tribunal referred the following question to the High Court of Judicature at Bombay under section 66 (1) of the Income-tax Act, 1922 :

"Whether on the facts and in the circumstances of the case the sum of Rs. 75,000 or any part thereof could be treated as dividend under section 2 (6-A) (c) of the Indian Income-tax Act, 1922 ?"

The reference was transferred after reorganisation of the State under the Bombay State Reorganisation Act, 1950, to the High Court of Gujarat for hearing and disposal

The reference was heard before a Bench consisting of Shelat, C.J., and Bhagwati, J., The two learned Judges differed, and the case was referred to Bakshi, J. Bakshi, J., agreed with Bhagwati, J., and answered the question referred to in the negative.

To appreciate the arguments advanced at the Bar, it is necessary to notice the changes which were made from time to time in section 2 (6-A) (c) of the Indian Income-tax Act, 1922, and the reasons for enacting and amending that clause. Clause (6-A) which defines "dividend" was inserted in the Indian Income-tax Act by Act VII of 1939. As originally enacted, it provided insofar as it is material for the purpose of this appeal:

" 'dividend' includes—

- | | | | |
|-----|---|---|---|
| (a) | * | * | * |
| (b) | * | * | * |

(c) any distribution made to the shareholders of a company of its accumulated profits of the company on the liquidation of the company :

Provided that only the accumulated profits so distributed which arose during the six previous years of the company preceding the date of liquidation shall be so included."

By section 3 of the Finance Act, 1955, the proviso to clause (c) was deleted and by section 3 of the Finance Act, 1956, with effect from 1st April, 1956, the following clause (c) was substituted :

"(c) any distribution made to the shareholders of a company on its liquidation, to the extent to which the distribution is attributable to the accumulated profits of the company immediately before its liquidation, whether capitalised or not."

By section 17 (2) of the Indian Companies Act, 1913, Reg. 97 of Table A was one of the obligatory regulations which had to be adopted in terms identical with or to the same effect in the Article of Association of every company. Regulation 97 provided that :

"No dividend shall be paid, otherwise than out of profits of the year or any other undistributed profits."

Distribution of the profits of the year or of accumulated profits was therefore "dividend" within the meaning of the Companies Act, 1913, and also of the Income-tax Act 1922. By Act VII of 1939 an inclusive definition of "dividend" was devised, so as to include therein heads of distribution by a company which may not normally be regarded as dividend ; and one such head was in clause (c). The reason for insertion of the clause was that on winding up of a company the distinction between the assets and undistributed profits disappears. It is well settled that a company as a going concern distributing profits of the year or accumulated profits is regarded as distributing dividend among the shareholders, but if the company is wound up before distributing its accumulated profits, any distribution of profits by the liquidator is not regarded under the Companies Act as dividend. In *Commissioners of Inland Revenue v. George Burrell*¹, Pollock, M.R., observed :

" * * * it is a misapprehension, after the liquidator has assumed his duties, to continue the distinction between surplus profits and capital. Lord Macnaghten in *Birch v. Cropper*², the case which finally determined the rights *inter se* of the preference and ordinary shareholders in the Bridgewater Canal, said : ' I think it rather leads to confusion to speak of the assets which are the subject of this application as 'surplus assets' as if they were an accretion or addition to the capital of the company capable of being distinguished from it and open to different considerations. They are part and parcel of the property of the company—part and parcel of the joint stock or common fund—which at the date of the winding up represented the capital of the company.' "

The amounts distributed to the shareholders by a liquidator are therefore distributed as capital of the company, since the liquidator has no power to distribute dividend, and the sums received by the shareholders cannot be disintegrated into capital and profits, by examining the accounts of the company when it was a going concern.

The scheme of the Indian Companies Act closely followed the English Companies Act and the view expressed in *George Burrell's case*¹, applied to distributions

1. L.R. (1924) 2 K.B. 52, 63.

2. (1889) L.R. 14 A.C. 525, 546.

made by liquidators, and those distributions were not liable to be taxed as dividend. The Parliament with a view to avoid escapement of tax devised a special definition of the word "dividend" and incorporated it by Act VII of 1939 as section 2 (6-A). The effect of the provision was to assimilate the distribution of accumulated profits by a liquidator to a similar distribution by a company as a going concern but subject to the limitation that while in the latter the profits distributed will be dividend whatever the length of the period for which they were accumulated, in the former such profits may be dividend only insofar as they come out of profits accumulated within six years prior to liquidation. It also appeared from the language used that profits of the current year during which the company was ordered or resolved to be wound up could not be included in the expression "dividend"; see *Sheth Haridas Achratlal v. Commissioner of Income-tax, Bombay North, Kutch and Saurashtra, Baroda*¹. By the Finance Act, 1955, the proviso to clause (c) was deleted and in consequence thereof the limitation relating to the period during which the profits were accumulated ceased to apply in the determination whether the amount distributed by the liquidator was dividend. Even after the amendment by the Finance Act, 1955, the language of the clause was found to be somewhat inapt and the Legislature by the Finance Act 1956 recast clause (c).

The Tribunal was of the view that,

"If earlier any distribution has been made, but such distribution or part of such distribution has not been considered as dividend, then, any subsequent distribution, if it is capable of being considered as dividend must be so held to be so."

Shelat C.J., opined that section 2 (6-A) (c) is not a charging section which levies tax on a particular fund from out of which a limited fund is carved out by the proviso. The learned Chief Justice observed ;

"The legislative intent is clear, namely to treat that portion of the amount distributed by the liquidator as chargeable as dividend which the Income-tax Department can trace to accumulated profits of the last six years and that portion only. * * * and therefore it is in respect of that limited fund only that the Department is permitted to go behind the liquidation proceedings and to disintegrate the assets lying with the liquidator."

The reasoning underlying these observations of the learned Chief Justice is that in the process of disintegration of an amount distributed, only the share which is brought to tax is dividend, and the rest continues to bear the character of capital.

Bhagwati, J., observed,

"that what the Legislature intended to achieve by enacting section 2 (6-A) (c) was to bring within the ambit of taxation the fund constituted of what were accumulated profits at the date of liquidation when it reaches the hands of the shareholders in liquidation. If a distribution in liquidation comes out of the source of accumulated profits—and whether it comes out of that source or not is not a question dependent on section 2 (6-A) (c)—section 2 (6-A) (c) declares that though under law, apart from the section, it would be capital and, therefore, not chargeable, it shall be regarded as dividend and taxed as such in the hands of the shareholders."

Bakshi, J., substantially agreed with Bhagwati, J., and held that since the Tribunal had not disintegrated Rs. 75,000 distributed, for ascertaining whether any part of it came out of the accumulated profits, no part of Rs. 75,000 could be regarded as dividend.

The Tribunal was therefore of the view that in a distribution by a liquidator in any year, only that amount which is brought to tax as dividend may be deemed to come out of the accumulated profits on disintegration of the two components, and that process will go on till the accumulated profit account in a notional sense is exhausted. On this view the amount distributed is disintegrated, as if it came out of two funds notionally distinct to the extent to which any part bears tax it is to be regarded as coming out of the accumulated profits, and the rest out of the capital. Shelat, C.J., expressed substantially the same view. Bhagwati and Bakshi, JJ., were of the view that since the enactment of section 2 (6-A) (c), in the hands of the liquidator, accumulated profits and capital may be deemed separate funds, and in

the case of each distribution the source from which the amount is withdrawn should be determined. If the source from which the amount is distributed is capital, the distribution is not taxable, if it is accumulated profit, it is taxable.

The language used by the Legislature in section 2 (6-A) (c) as amended by the Finance Act, 1956, is fairly clear. There is in the hands of the liquidator only one fund. When a distribution is made out of the fund, for the purpose of determining tax liability, and only for that purpose, the amount distributed is disintegrated into its components—capital and accumulated profits—as they existed immediately before the commencement of liquidation. In any distribution made to the shareholders of a company by the liquidator, that part which is attributable to the accumulated profits of the company immediately before its liquidation, whether such profits have been capitalised or not, would be treated as dividend and liable to tax under the Act. The provision was intended to supersede the application of the principle of *George Burrell's case*¹, that is to enact that even though on a winding up of a company the distinction between the assets and the accumulated profits disappears, the taxing authority may disintegrate the amount distributed into its component parts and determine the share attributable to accumulated profits. The amount distributed would therefore be deemed to be received by the shareholders partly as accumulated profits and the rest as capital, the proportion being the same which the accumulated profits bore to the capital in the accounts of the company at the commencement of winding-up, and that part of the receipt which is attributable to the accumulated profits would be taxable. The Income-tax Officer has therefore in the first instance to determine the accumulated profits in the hands of the company whether capitalised or not, and the rest of the capital immediately before the liquidation; he has then to determine the ratio between such capital and the undistributed profits and to apply the ratio to the amount distributed to determine the component attributable to accumulated profits. There is in section 2 (6-A) (c) no warrant for the view that in the course of liquidation the accumulated profits exist as a separate fund even in a notional sense. Each distribution is of a consolidated amount which represents both capital and accumulated profits. There is also nothing in the clause which supports the view that whatever is brought to tax by the taxing authorities in a given year is dividend, and the rest represents the assets of the company. The fund in the hands of the liquidator is one; when the fund or a part of it is distributed, the distribution is deemed to take place in the same proportion in which the capital and accumulated profits stood in the accounts of the company immediately before the winding up.

We discharge the answer recorded by the High Court, and record the answer that,

“that part of Rs. 75,000 which bears the same ratio to Rs. 75,000 which the accumulated profits at the date of liquidation bore to the total assets of the company immediately before liquidation is dividend”.

In the present case the Tribunal has not determined what part of Rs. 75,000 represents accumulated profits. But on the view we have taken of the true meaning of section 2 (6-A) (c) of the Act, the Tribunal was bound to do so.

The appeal is therefore partially allowed. There will be no order as to costs.

K.G.S.

High Court's answer set aside; Answer recorded accordingly.

THE SUPREME COURT OF INDIA.

PRESENT :—J. C. SHAH AND V. BHARGAVA, JJ.

Sree Meenakshi Mills, Ltd., Madurai

.. Appellant*

v.

Commissioner of Income-tax, Madras

.. Respondent.

Income-tax Act, (XI of 1922), section 10 (2) (xv)—Business expenditure—Legal expenses—Restrictions in the carrying on of a business—Imposed by legislative or executive act—Legal proceedings to quash act—Expenses—Allowable business expenditure—Expenditure incurred need not be directly to earn income—Persistence in proceedings by filing successive appeals or ultimate failure—Not relevant—Assessee, mills carrying on business—Cotton spinning and weaving—Delivery of yarn, manufactured, to weavers outside for weaving into cloth—Cotton Control Order—Assessee prohibited from delivering yarn to such weavers—Legal proceedings and successive appeals to quash the order—Expenses thereof and costs payable to Government—Permissible business expenditure.

The assessee-mills was carrying on business of cotton spinning and weaving. As its handlooms were inadequate to weave the yarn produced by the mills, part of the yarn produced was distributed to weavers outside the factory engaged by the assessee to weave the yarn into cloth. On 7th February, 1946 the Textile Commissioner issued an order under Cotton Cloth and Yarn (Control) Order, 1945, prohibiting the assessee from selling or delivering yarn manufactured by it to such weavers. When the assessee claimed that the prohibition was *ultra vires* the authority conferred under the Control Order and continued to deliver yarn to weavers outside the factory, the Textile Commissioner issued another order prohibiting such delivery on 20th February, 1946. The assessee filed a petition for a writ of *mandamus* in the High Court praying for an order against the Textile Commissioner seeking him to forbear from acting under the Order. On the dismissal of the petition as not maintainable the assessee went in successive appeals and ultimately the Privy Council dismissed the appeal. The costs incurred in prosecuting the proceedings and costs ordered to be paid to Government by the assessee were claimed as business expenditure under section 10 (2) (xv). On the rejection of the claim by the department, Tribunal and the High Court, the assessee appealed. The Tribunal had found that the assessee did not, after 20th February, 1946, deliver any yarn to weavers outside the factory.

Held, that the expenditure incurred to resist, in a civil proceeding, the enforcement of a measure—legislative or executive—which imposes the restrictions on the carrying on of a business, or to obtain a declaration that the measure is invalid would, if other conditions are satisfied, be admissible under section 10 (2) (xv) of the Act as a permissible deduction in the computation of taxable income.

The primary motive in incurring the expenditure admissible to deduction under section 10 (2) (xv) need not be directly to earn income thereby.

Persistence of the assessee in launching the proceeding and carrying it from Court to Court and incurring expenditure for that purpose or the failure of such proceedings cannot be a ground for disallowing the claim.

Held on facts : the object of the petition filed by the assessee was to secure a declaration that the order dated 20th February, 1946 in so far as it sought to put restrictions upon the right of the assessee to carry on its business in the manner in which it was accustomed to do was unauthorised and to prevent enforcement of the order ; thereby the assessee was seeking to obtain an order from the Court enabling the business to be carried on without interference. The finding of the Tribunal (the High Court ought to have taken this fact from the statement of the case and not from the other proceedings filed by the assessee in the civil Court) was that after 20th February, 1946 the assessee did not distribute any yarn contrary to the order. It cannot therefore be said that the assessee was seeking to protect itself against a criminal prosecution and the consequences arising from infringement of the order dated 20th February, 1946. The expenditure was an allowable deduction under section 10 (2) (xv).

Appeal by Special Leave from the Judgment and Order dated the 19th September 1962, of the Madras High Court in Tax Case No. 87 of 1960.

R. Ganapathy Iyer, Advocate, for Appellant .

R. M. Hazarnavis, Senior Advocate, (R. N. Sachthey, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by .

Shah, J.—Sree Meenakshi Mills, Ltd.—a company incorporated under the Indian Companies Act with its registered office at Madurai carries on business of cotton spinning and weaving. In the premises of the factory of the company there are installed 80 handlooms. These handlooms were found inadequate to weave the yarn produced by the factory and a part of the yarn produced was distributed to weavers outside the factory who were engaged by the company to weave the yarn into cloth. Under clause 18-B of the Cotton Cloth and Yarn (Control) Order, 1945, issued by the Government of India, the Textile Commissioner was authorized to direct any manufacturer or dealer or any class of manufacturers or dealers, *inter alia*, not to sell or deliver any yarn or cloth of specified description except to such person or persons and subject to such conditions as the Textile Commissioner may specify. On 7th February, 1946, the Textile Commissioner issued an order directing the company not to sell or deliver any yarn manufactured by the company except to such person or persons as the Textile Commissioner may specify. It was recited in the order that “nothing in this order shall apply to a sale or delivery made, in pursuance of clause 18-A of the said order, to any dealer in yarn not engaged in the production of cloth on handlooms or powerlooms”. The company addressed a letter on 13th February, 1946 to the Textile Commissioner submitting that the prohibition in general terms was *ultra vires* the authority conferred by the Cotton Cloth and Yarn (Control) Order. The company continued notwithstanding the prohibition to deliver yarn to weavers and did so till 20th February, 1946. This yarn was seized under the orders of the Textile Commissioner. On 20th February, 1946, the Provincial Textile Commissioner purporting to act in exercise of authority conferred upon him by a notification issued by the Government of India, issued an order addressed to the company that :

“You should accordingly confine your delivery to the categories of persons notified below :—

(a) Licensed yarn dealers (in accordance with the said 18-A of the Control Order).

(b) To consumers who purchased yarn directly from you during the basic period 1940—42 (in accordance with my circular letter dated 4th January, 1946 referred to above).

(c) Your handloom factory situated in the premises of your Mills at Madurai (just the quantity of yarn required).

NOTE.—Any other delivery of yarn by you which is not covered by a special order or permission of the Textile Control Authorities will accordingly be a contravention of the Textile Commissioner's order under clause 18-B referred to above.”

After this order was issued, the company did not deliver any yarn to weavers.

On 4th March, 1946 the company filed a petition for a writ of *mandamus* in the High Court of Madras under section 45 of the Specific Relief Act praying for an order directing the Provincial Textile Commissioner, Madras, to desist from seizing the yarn supplied to the weavers at or around Madurai and Rajapalayam for the purpose of converting the yarn belonging to the company into cloth; to restore to the company or to direct the Provincial Textile Commissioner and his subordinates to restore the yarn already seized; and to forbear from seizing or to direct the subordinates of the Provincial Textile Commissioner to forbear from seizing the yarn that may be entrusted to the weavers by the company in the usual course of business according to the practice already obtaining for conversion into cloth. This petition was dismissed by Kunhi Raman, J., and the order of dismissal was confirmed in appeal by the High Court. The matter was then carried in appeal to the Privy Council. The Judicial Committee dismissed the appeal filed by the company. They held, agreeing with the High Court, that the expression “deliver” in clause 18-B, sub-clause (1) (b), of the Cotton Cloth and Yarn (Control) Order, 1945, is used in its ordinary broad sense of handing over possession, as distinct from passing of property, and would include delivery of possession to a bailee. Accordingly, delivery

of part of its yarn by the company to owners of handlooms outside the mill premises for conversion of the yarn into cloth for the company was in contravention of the order made under clause 18-B, sub-clause (1) (b). The Judicial Committee also held that a petition under section 45 of the Specific Relief Act, 1877, directing the Provincial Textile Commissioner to desist from seizing the yarn supplied to the weavers and to restore to the company the yarn already seized was incompetent as the acts in respect of which relief was asked for took place outside the limits of the Ordinary Original Civil Jurisdiction of the High Court.

The company spent Rs. 20,035 in prosecuting the proceedings under section 45 of the Specific Relief Act and had also to pay Rs. 5,912 as costs to the Government of the unsuccessful appeal to the Judicial Committee. In its returns of income the company claimed deduction of the amounts of Rs. 20,035 and Rs. 5,912 for the assessment years 1949-50 and 1950-51 respectively as being expenditure wholly and exclusively laid out for the purpose of its business. The claims were rejected by the departmental authorities, and by the Income-tax Appellate Tribunal. The Tribunal then referred the following question to the High Court of Judicature at Madras :

"Whether the expenses of Rs. 20,035 incurred in the assessment year 1949-50 and Rs. 5,912 (relating to the assessment year 1950-51) being the cost paid to Government as directed by the Privy Council were expenses incurred in the ordinary course of business and allowable as deductions?"

The question as framed is somewhat vague. But it is common ground that the company claimed deduction under section 10 (2) (xv) of the Indian Income-tax Act, 1922 on the footing that the two amounts represented expenditure laid out wholly and exclusively by the company for the purpose of its business. The High Court answered the question in the negative. With Special Leave, the company has appealed to this Court.

The Tribunal has found that after the order dated 20th February, 1946 was issued, the company did not deliver yarn to any weaver. It is recited in the judgment of the Tribunal that a "correct order by the proper authorities was passed" on 20th February, 1946 and thereafter the company did not distribute any yarn to weavers. The averments made by the company in the petition under section 45 of the Specific Relief Act, are somewhat involved, but in substance the claim of the company was that the Provincial Textile Commissioner was incompetent to pass the order dated 20th February, 1946 which placed restrictions on the business of the company and the order was "likely to cause irreparable and irretrievable injury", and it was prayed that an order do issue under section 45 of the Specific Relief Act restraining the Provincial Textile Commissioner from enforcing the order and the Textile Commissioner be prohibited by an order from seizing the yarn delivered to the weavers outside the factory and be further ordered to restore the yarn already seized. No clear averment was made in the petition about the date on which the yarn seized had been delivered by the company to the weavers.

This petition failed, because the High Court had no jurisdiction to entertain the petition, and also because the expression "deliver" used in clause 18-B of the Control Order included handing over of yarn to the weavers outside the premises of the factory for conversion into cloth. But expenditure incurred in prosecuting a civil proceeding relating to the business of an assessee is admissible as expenditure laid out wholly and exclusively for the purpose of the business even if the proceeding is decided against the assessee. It was held by this Court in *Commissioner of Income-tax, West Bengal v. H. Hirjee*¹, that the deductibility of expenditure under section 10 (2) (xv) must depend on the nature and purpose of the legal proceeding in relation to the business whose profits are under computation and cannot be affected by the final outcome of that proceeding. The proceeding started by the company was in relation to the business of the company. The company was thereby seeking relief against interference by the executive authorities in the conduct of its business in the

1. (1953) S.C.J. 448 : (1953) 1 M.L.J. 849 : 1953 S.C. 324.
(1953) 23 I.T.R. 427; (1953) S.C.R. 714; A.I.R.

manner in which it was being carried on previously. It was also seeking to obtain an order for restoration of its goods which were seized. It may be granted that the company was, in starting the proceeding, ill-advised. However wrong-headed, ill-advised, unduly optimistic or over-confident in his conviction the assessee may appear in the light of the ultimate decision, expenditure in starting and prosecuting the proceeding may not be denied admission as a permissible deduction in computing the taxable income, merely because the proceeding has failed, if otherwise the expenditure is laid out for the purpose of the business wholly and exclusively, i.e., reasonably and honestly incurred to promote the interest of the business. Persistence of the assessee in launching the proceeding and carrying it from Court to Court and incurring expenditure for that purpose again cannot be a ground for disallowing the claim.

Under section 10 (2) (xv) of the Indian Income-tax Act as amended by Act VII of 1939 expenditure even though not directly related to the earning of income may still be admissible as a deduction. Expenditure on civil litigation commenced or carried on by an assessee for protecting the business is admissible as expenditure under section 10 (2) (xv) provided other conditions are fulfilled, even though the expenditure does not directly relate to the earning of income. Expenditure incurred not with a view to direct and immediate benefit for purposes of commercial expediency and in order indirectly to facilitate the carrying on of the business is therefore expenditure laid out wholly and exclusively for the purposes of the trade. In *Morgan (Inspector of Taxes) v. Tate & Lyle, Ltd.*¹, the House of Lords held that expenditure incurred by a company engaged in sugar refining, in a propaganda campaign to oppose the threatened nationalization of the industry was a sum wholly and exclusively laid out for the purpose of the company's trade and was an admissible deduction from its profits for income-tax purposes. A majority of the House held that the object of the expenditure being to preserve the assets of the company from seizure and so to enable it to carry on and earn profits, the expenditure was a permissible deduction under rule 3 (a) of the Rules applicable to Cases (1) and (2) of Schedule D of the Income-tax Act, 1918.

The object of the petition filed by the company was to secure a declaration that the order dated 20th February, 1946 in so far as it sought to put restrictions upon the right of the company to carry on its business in the manner in which it was accustomed to do was unauthorized and to prevent enforcement of that order : thereby the company was seeking to obtain an order from the Court enabling the business to be carried on without interference. Expenditure incurred in that behalf would without doubt be expenditure laid out wholly and exclusively for the purpose of the business of the company.

It was argued however that the yarn delivered by the company to the weavers contrary to the prohibitory order dated 20th February, 1946, was attached under the order of the Provincial Textile Commissioner, and since the company violated the prohibitory order, the primary object of the petition for *mandamus* instituted by the company was to secure protection against prosecution of the company and an order for return of the goods in respect of which an offence was committed. Expenditure incurred in prosecuting that claim was, it was said, not laid out wholly and exclusively for the purpose of the business. Reliance was placed upon the judgment of this Court in *H. Hirjee's case*², in which it was held that a person who was prosecuted for an offence under section 13 of the Hoarding and Profiteering Ordinance, 1943, on a charge of selling goods, at prices higher than were reasonable, in contravention of the provisions of section 6 thereof, and a part of his stock was seized and taken away, was not entitled to claim deduction under section 10 (2) (xv) of the Income-tax Act for the sums spent in defending the criminal proceedings against him because the expenditure could not be said to have been laid out and expended wholly and exclusively for the purpose of the business. But the assumption underlying the argument is not true. The Tribunal has in the Statement of The Case observed in paragraph 2 :

1. (1954) 26 I.T.R. 195 : 35 T.C. 367 : (1954)
3 W.L.R. 85 : (1954) 2 All E.R. 413.

2. (1953) S.C.J. 448 : (1953) 1 M.L.J. 849 :
(1953) S.C.R. 714.

"Subsequently, on 20th February, 1946, a proper order by the appropriate authority was passed and it is common ground that after that date, at any rate no further distribution of yarn was made by the assessee. In the interim (period) between 7th February, 1946 and 20th February, 1946, the yarn which was distributed to the handloom weavers was the subject of seizure by the Provincial Textile Commissioner and this the assessee sought to resist by filing an application under section 45 of the Specific Relief Act (1 of 1877). * * *

In the view of the Tribunal the company did not act in violation of the terms of the order dated 20th February, 1946; it cannot therefore be said that the company was seeking to protect itself against a criminal prosecution and the consequences arising from the infringement of the order dated 20th February, 1946.

It is true that in the judgment in appeal from the order refusing *mandamus*, Leach, C.J., speaking for the Court observed (See *Sree Meenakshi Mills v. Provincial Textile Commissioner, Madras*¹):

"In spite of the fact that this order in effect prohibited the appellant delivering yarn to owners of handlooms situated outside the mill premises, the appellant continued to deliver yarn to such weavers, and"

the Judicial Committee observed:

"Despite the prohibition the appellant continued to deliver yarn to such owners in order (as already mentioned) that they might turn the yarn into cloth and bring the article back to the mills." (See *Sree Meenakshi Mills, Ltd. v. Provincial Textile Commissioner, Madras*²).

But the Tribunal has observed in its order dismissing the appeal filed by the company that it was "not disputed before them" that after 20th February, 1946, the company did not distribute any yarn.

The question referred in this case must be decided not on what was found or observed by the High Court in appeal from the order in the proceedings under section 45 of the Specific Relief Act or by the Judicial Committee, but upon findings of fact recorded by the Tribunal. It is unfortunate that the High Court took the facts not from the Statement of The Case, but apparently from the judgment of the Judicial Committee. The High Court assumed that the company had contravened the law because it delivered yarn to weavers in contravention of the order dated 20th February, 1946. But the assumption on which the discussion is founded is erroneous.

The High Court also thought that expenditure to fall within the terms of section 10 (2) (xv) must be one for the purpose of earning income, and there was no material on the record to show that the expenditure was so incurred. If it is intended thereby to imply that the primary motive in incurring the expenditure admissible to deduction under section 10 (2) (xv) must be directly to earn income thereby, we are with respect unable to agree with that view.

This Court in *Commissioner of Income-tax, Kerala v. Malayalam Plantations, Ltd.*³, observed:

"The expression 'for the purpose of the business' is wider in scope than the expression 'for the purpose of earning profits.' Its range is wide: it may take in not only the day-to-day running of a business, but also the rationalization of administration and modernization of its machinery: it may include measures for the preservation of the business or for the protection of its assets and property from expropriation, coercive process or assertion of hostile title: it may also comprehend payment of statutory dues and taxes imposed as a precondition to commence or for carrying on of a business; it may comprehend many other acts incidental to the carrying on of a business."

Expenditure incurred to resist in a civil proceeding the enforcement of a measure—legislative or executive—which imposes restrictions on the carrying on of a business, or to obtain a declaration that the measure is invalid would, if other conditions are satisfied, be admissible, in our judgment, under section 10 (2) (xv) as a permissible deduction in the computation of taxable income.

1. (1946) 2 M.L.J. 188 : A.I.R. 1947 Mad. 82. M.L.J. 495 : I.L.R. (1950) Mad. 679 : A.I.R. 1949 P.C. 307.

2. (1949) L.R. 76 I.A. 191, 195 : (1949) 2

3. (1964) 2 I.T.J. 130 : (1964) 2 S.C.J. 338.

The appeals are therefore allowed. The question referred is answered in the affirmative. The appellant-company will be entitled to its costs in this Court and the High Court. One hearing fee.

V.S.

Appeals allowed.

THE SUPREME COURT OF INDIA.
(Criminal Appellate Jurisdiction.)

PRESENT :—J. R. MUDHOLKAR AND V. RAMASWAMI, JJ.

Ram Chandra Aggarwal and another

.. Appellants*

v.

The State of Uttar Pradesh and another

.. Respondents.

The Attorney-General for India

.. Intervener.

Civil Procedure Code (V of 1908), section 24—Power of transfer—District Judge if can transfer reference by Magistrate to a civil Court under section 146 of the Criminal Procedure Code to another civil Court—Court to which reference is made—If persona designata—Proceeding if writ proceeding to which Civil Procedure Code applies.

No doubt a Magistrate while discharging his function under the Code of Criminal Procedure under section 145 (1), would be exercising his criminal jurisdiction because that is the only kind of jurisdiction which the Code confers upon the Magistrates but when the Magistrate refers the question to a civil Court he does not confer a part of his criminal jurisdiction upon the civil Court. The reference is to the civil Court and not to *persona designata*. The proceedings before the civil Court are civil proceedings.

The provisions of section 24 (1) (b) of the Code of Civil Procedure are available with respect to a proceeding arising out of a reference under section 146 (1), Criminal Procedure Code. Such proceeding can be transferred under section 24 to another Subordinate civil Court (Munsiff's Court) by the District Judge or High Court.

Appeal from the Judgment and Order dated the 26th October, 1964, of the Allahabad High Court in Criminal Revision No. 808 of 1963.

J. P. Goyal, Advocate, for Appellants.

O. P. Rana and Atiqur Rehman, Advocates, for Respondent No. 1.

S. K. Mehta and K. L. Mehta, Advocates, for Respondent No. 2.

B. R. L. Iyengar, Senior Advocate (B. R. G. K. Achar, Advocate, with him), for Intervener.

The Judgment of the Court was delivered by

Mudholkar, J.—The only point which falls to be decided in this appeal by certificate granted by the High Court at Allahabad is whether the District Judge has jurisdiction under section 24 of the Code of Civil Procedure to transfer a reference made by a Magistrate to a particular civil Court under section 146 of the Code of Criminal Procedure to another civil Court. It arises this way. Proceedings under section 145, Criminal Procedure Code, were initiated by a Magistrate on the basis of a report of a police officer to the effect that a dispute likely to cause a breach of the peace exists concerning a plot of land situate within the jurisdiction of the Magistrate between the parties mentioned in the report and praying for appropriate action under section 145 of the Code of Criminal Procedure. The learned Magistrate upon being satisfied about the possibility of a breach of the peace made a preliminary order under section 145, Criminal Procedure Code, attached the property to which the dispute related and called upon the parties to adduce evidence in respect of their respective claims. In due course he recorded the evidence but he was unable to make up his mind as to which of the parties was in possession on the date of the preliminary order and within two months thereof. He, therefore, referred the case under section 146 (1) of the Criminal Procedure Code to a civil Court for decision as to which of the parties was in possession at the material point of time and in the meanwhile directed that the attachment of the property shall

continue. The reference went to the Court of the Munsiff within whose territorial jurisdiction the property was situate. But thereafter one of the parties Brij Gopal Binani, respondent No. 2 before us, made an application to the District Judge under section 24, Civil Procedure Code, for transfer of the case to some other Court. The ground given was that in the execution case out of which proceedings under section 145, Criminal Procedure Code, had arisen the same Munsiff had made an order against him depriving him of costs. The Munsiff having no objection to the transfer the District Judge transferred the case to the Court of another Munsiff. The opposite parties, that is, the appellants before us—Rām Chandra Aggarwal and Kedar Prasad Aggarwal—acquiesced in the order of transfer and did not raise any question as to the jurisdiction of the transferee Court to hear and decide the reference. Eventually evidence was led by both sides and finding given by the transferee Court. This finding was in favour of the second respondent. After receiving the finding the learned Magistrate heard the parties and held that it was the second respondent who was in possession at the relevant date and passed an order under section 145 (6), Criminal Procedure Code, pursuant thereto. A revision application was preferred by the appellants before the Court of Sessions in which the objection was taken for the first time that the decision of the civil Court was a nullity because it had no territorial jurisdiction over the subject-matter of the dispute. It was further contended that the District Judge had no jurisdiction to transfer the case and that consequently the ultimate order made by the learned Magistrate was a nullity. The learned Additional Sessions Judge who heard the revision application rejected these contentions on the ground that they were not raised earlier. The appellants then took the matter to the High Court in revision. The appellants rested their revision application on the sole ground that section 24, Civil Procedure Code, was not available in respect of a reference under section 146 (1), Criminal Procedure Code, and that, therefore, the proceedings subsequent to the transfer of the reference from the Court of one Munsiff to that of another are a nullity. The High Court permitted the point to be urged. The attack was based upon two grounds: that the reference under section 146 (1), Criminal Procedure Code, was to a *persona designata* and that the provisions of section 24, Civil Procedure Code, were not available with respect to it. The second ground was that the proceeding before the civil Court was not a civil proceeding within the meaning of section 141, Civil Procedure Code. The High Court negatived both the grounds on which the contention was based.

On behalf of the appellants Mr. Goyal has reiterated both the contentions. In fairness to Mr. Goyal it must be said that his attack on the order of the District Judge transferring the case under section 24, Civil Procedure Code, was based more on the ground that the reference under section 146 (1), Criminal Procedure Code is not a civil proceeding than on the ground that that reference was to a *persona designata*. However, as he did not wish to abandon the other point we must deal with it even though Mr. B. R. L. Iyengar who appears for the State conceded that a reference under section 146 (1) is to a constituted Court and not to a *persona designata*.

In *Balakrishna Udayar v. Vasudeva Aiyar*¹, Lord Atkinson has pointed out the difference between a *persona designata* and a legal tribunal. The difference is this that the "determinations of a *persona designata* are not to be treated as judgments of a legal tribunal". In the *Central Talkies, Ltd. v. Dwarka Prasad*², this Court has accepted the meaning given to the expression *persona designata* in Osborn's Concise Law Dictionary, 4th edn., p. 263 as "a person who is pointed out or described as an individual, as opposed to a person ascertained as a member of a class, or as filling a particular character". Section 146 (1), Criminal Procedure Code, empowers a Magistrate to refer the question as to whether any, and if so, which of the parties was in possession of the subject-matter of dispute at the relevant point of time to a civil Court of competent jurisdiction. The power is not to refer the matter to the presiding Judge of a particular civil Court but to a Court. When a special or

1. (1917) 33 M.L.J. 69 ; L.R. 44 I.A. 261 ;
I.L.R. 40 Mad. 793 (P.C.).

2. (1962) 2 S.C.J. 41 : (1961) 3 S.C.R. 495,
at pp. 500-501.

local law provides for an adjudication to be made by a constituted Court—that is, by a Court not created by a special or local law but to an existing Court—it in fact enlarges the ordinary jurisdiction of such a Court. Thus where a special or local statute refers to a constituted Court as a Court and does not refer to the presiding officer of that Court the reference cannot be said to be to a *persona designata*. This question is well settled. It is, therefore, unnecessary to say anything more on this part of the case except that cases dealing with the point have been well summarised in the recent decision in *Chatur Mohan v. Ram Behari Dixit*¹.

Now, as to the argument based on the ground that the proceeding before the civil Court is not a civil proceeding, Mr. Goyal's contention is that since the proceeding before the criminal Court under section 145 is a criminal proceeding any matter arising out of it, including a reference to a civil Court, does not lose its initial character of a criminal proceeding. In support of his contention he has placed strong reliance upon the observations of Jagdish Sahai, J., in *Sri Sheonath Prasad v. City Magistrate, Varanasi*². In that case the learned Judge was called upon to consider the meaning of the expression "civil Court of competent jurisdiction" occurring in section 146 (1) of the Code of Criminal Procedure. It was contended before him that the competency of the Court is to be determined not merely with respect to the territorial jurisdiction of the Court but also with respect to its pecuniary jurisdiction. The question arose because it was contended before him that the finding on a question of possession was recorded by a civil Court which though it had territorial jurisdiction over the subject-matter of the dispute the value of the subject-matter was in excess of the pecuniary jurisdiction of the Court. In the course of his judgment the learned Judge has observed: "that a proceeding even on reference made to a civil Court retains its old moorings and does not change its character from a criminal proceeding to a civil proceeding and does not become a proceeding in the suit". Then he went on to point out that the criminal Court still retains its jurisdiction because it could withdraw the reference from the civil Court at any time and also because the ultimate decision with respect to the dispute between the parties was to be made by the Magistrate and not by the civil Court. All this, according to the learned Judge, would show that the proceeding even before the civil Court would not be a civil proceeding and the idea of pecuniary jurisdiction of a Court being foreign to the Code of Criminal Procedure it was not necessary to ascertain whether the Court to which a reference was made under section 146 (1), Criminal Procedure Code, had pecuniary jurisdiction over the subject-matter of the dispute or not. This decision ignores the vast body of authority which is to the effect that when a legal right is in dispute and the ordinary Courts of the country are seized of such dispute the Courts are governed by the ordinary rules of procedure applicable to them. Two of the decisions are *Adaikappa Chettiar v. Chandrasekhara Thevar*³, and *Maung Ba Thaw v. Ma Pin*⁴, and also a decision of this Court which proceeds upon the same view. Then in *South Asia Industries (P.) Ltd. v. S. B. Sarup Singh*⁵, it was held that where a statute confers a right of appeal from the order of a tribunal to the High Court without any limitation thereon the appeal to the High Court will be regulated by the practice and procedure obtaining in the High Court. We would also like to refer to the decision of this Court in *Narayan Row v. Ishwarlal*⁶, in which it was held that there is no reason for restricting the expression "civil proceeding" only to those proceedings which arise out of civil suits or proceedings which are tried as civil suits. Though this decision was concerned with the meaning of the words "civil proceeding" used in Article 133 (1) (c) of the Constitution the reasoning behind it sufficiently repels the extreme contention of Mr. Goyal that a proceeding stemming from a criminal matter must always bear the stamp of a criminal proceeding. Then, according to Mr. Goyal, when a Magistrate refers a question as to which party was in possession at the relevant date what he does is to delegate that duty, initially resting upon him, to the civil

1. (1964) All.L.J. 256.

2. A.I.R. 1959 All. 467.

3. (1947) 1 M.L.J. 41 : L.R. 74 I.A. 264 ;
I.L.R. (1948) Mad. 505.

4. (1934) 66 M.L.J. 404 : L.R. 61 I.A. 158.

5. A.I.R. 1965 S.C. 1442.

6. (1965) 2 S.C.J. 359 : (1965) 2 I.T.J. 264.

Court. In performing that duty the civil Court would, therefore, be acting as a criminal Court just as the Magistrate would be doing where he has to decide the question himself. The two Privy Council decisions we have referred to sufficiently answer this contention. No doubt, the Magistrate, while discharging his function under the Code of Criminal Procedure under section 145 (1), would be exercising his criminal jurisdiction because that is the only kind of jurisdiction which the Code confers upon the Magistrates but when the Magistrate refers the question to a civil Court he does not confer a part of his criminal jurisdiction upon the civil Court. There is no provision under which he can clothe a Court or a tribunal which is not specified in the Criminal Procedure Code with criminal jurisdiction. We are, therefore, unable to accept the contention of Mr. Goyal.

Mr. Iyengar tried to put the matter in a somewhat different way. In the first place, according to him, if we hold that the proceeding before the civil Court is a civil proceeding then all the rules of procedure contained in the Civil Procedure Code, including those relating to appeals or revision would apply to the proceeding. This, he points out, would be contrary to the provisions of section 146 (1-D) of the Code of Criminal Procedure which bar an appeal, review or revision from any finding of the civil Court. From this he wants us to infer that the proceeding does not take the character of a civil proceeding even though it takes place before a civil Court. We are not impressed by this argument. If sub-section (1-D) had not been enacted (and this is really a new provision) an appeal or revision application would have been maintainable. Now that it is there, the only effect of it is that neither an appeal nor a revision is any longer maintainable. This consequence ensues because of the express provision and not because the proceeding before the civil Court is not a civil proceeding.

The next contention—and it was the one pressed strenuously by him—was that a proceeding upon a reference under section 146 (1) entertained by a civil Court not being an original proceeding the provisions of section 141, Civil Procedure Code are not attracted and that, therefore, those provisions of the Civil Procedure Code which relate to suits are not applicable to a proceeding undertaken by a civil Court upon a reference to it under section 146 (1) of the Code of Criminal Procedure. A number of cases dealing with this point were brought to our notice either by him or by Mr. Goyal. It seems to us, however, that those cases are not relevant for deciding the point which is before us. In passing, however, we may mention the fact that a Full Bench of the Allahabad High Court has held in *Maha Ram v. Harbans*¹, that the civil Court to which an issue on the question of proprietary rights has been submitted by a revenue Court under section 271 of the Agra Tenancy Act, 1926 has jurisdiction to refer the issue to arbitration under paragraph 1 of Schedule II of the Civil Procedure Code. This decision is based upon the view that by virtue of section 141, Civil Procedure Code, the provisions relating to arbitration contained in the Second Schedule to the Code of Civil Procedure, before the repeal of that schedule, applied to a proceeding of this kind. Similarly recently this Court has held in *Munshi Ram v. Banwarilal*², that under section 41 of the Arbitration Act and also under section 141, Civil Procedure Code, it was competent to the Court before which an award made by an arbitration tribunal is filed for passing a decree in terms thereof to permit parties to compromise their dispute under Order 23, rule 3, Civil Procedure Code. Though there is no discussion, this Court has acted upon the view that the expression "civil proceeding" in section 141 is not necessarily confined to an original proceeding like a suit or an application for appointment of a guardian, etc., but that it applies also to a proceeding which is not an original proceeding. Thus, though we say that it is not necessary to consider in this case whether the proceeding before the civil Court is a civil proceeding as contemplated by section 141 or not there is good authority for saying that it is a civil proceeding. All that we are concerned with in this case is whether the provisions of section 24 (1) (b) of the Code of Civil Procedure are available with respect

1. I.L.R. (1941) All. 193.

2. (1962) 2 S.C.J. 274 : (1962) 2 S.C.R.

(Supp.) 477 : A.I.R. 1962 S.C. 903.

to a proceeding arising out of a reference under section 146 (1), Criminal Procedure Code. The relevant portion of section 24 may, therefore, be set out. It reads thus :

“On the application of any of the parties and after notice to the parties and after hearing such of them as desired to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage—

(a)

(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and

(i)

(ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same ; or

(iii)

It plainly speaks of “other proceeding pending in any Court subordinate to it” and not only to the civil proceeding pending before a subordinate Court. The decisions of the Privy Council and one decision of this Court which we have earlier quoted would warrant the application of the provisions of the Code of Civil Procedure generally to a proceeding before a civil Court arising out of a reference to it by a Magistrate under section 146 (1) of the Code of Criminal Procedure. The expression “proceeding” used in this section is not a term of art which has acquired a definite meaning. What its meaning is when it occurs in a particular statute or a provision of a statute will have to be ascertained by looking at the relevant statute. Looking to the context in which the word has been used in section 24 (1) (b) of the Code of Civil Procedure it would appear to us to be something going on in a Court in relation to the adjudication of a dispute other than a suit or an appeal. Bearing in mind that the term “proceeding” indicates something in which business is conducted according to a prescribed mode it would be only right to give it, as used in the aforesaid provision, a comprehensive meaning so as to include within it all matters coming up for judicial adjudication and not to confine it to a civil proceeding alone. In a recent case *Kochadai Naidu v. Nagavasami Naidu*¹, Ramachandra Iyer, J., (as he then was) was called upon to consider the very question which arises before us. The learned Judge held that a proceeding before a civil Court arising out of a reference to it under section 146 (1), Criminal Procedure Code can be transferred by the High Court or District Court under section 24, Civil Procedure Code because it is in any case a “proceeding”. He has also considered this question from the angle of the nature of the proceeding and expressed the view that the proceeding was a civil proceeding to which the procedure for suits could, with the aid of section 141, Civil Procedure Code be applied. If indeed the term “proceeding” in section 24 is not confined to a civil proceeding there is no need whatsoever of taking the aid of section 141, Civil Procedure Code. Upon this view we dismiss the appeal.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—J. C. SHAH, V. RAMASWAMI AND V. BHARGAVA, JJ.

Hukumchand Mills, Ltd.

Appellant*

v.

Commissioner of Income-tax, Central Bombay

Respondent.

Income-tax Act (XI of 1922), sections 10 (2) (vi), 10 (5) (b) and 33 (4) and Appellate Tribunal Rules, 1946, rules 12 and 27—Tribunal—Appeal—Powers of remand—Assessee-company registered and carrying on business in former Indian State—Constitution of India—Assessee liable to be assessed as a resident, of Part B State—Computation of written-down value and depreciation—Assessment year 1950-51—Appeal by assessee before the Tribunal—Depreciation actually allowed—Taxation Laws Order and Industrial Tax Rules of former State allowing depreciation—Applicability raised by Revenue for the first time before the Tribunal—Power of the Tribunal in entertaining plea and remanding matter back to Officer.

After the advent of the Constitution of India, the assessee-company, incorporated in the previous Indore State and owning a textile mill there, became liable to be assessed under the Indian Income-tax Act as a resident (being a resident of a Part B State) from the assessment year 1950-51. In regard to the determination of proper written-down value and depreciation allowance, the assessee relying upon section 10 (5) (b) of the Indian Income-tax Act contended that the original cost should be taken into account as no depreciation had been actually allowed under the Act. The case of the Department was that it was necessary to determine the total income of the assessee to arrive at the taxable proportionate income assessable under the Act as a non-resident and as depreciation had been allowed to arrive at such total income, the same must be taken into account to arrive at the written-down value as it had been actually allowed within the meaning of section 10 (5) (b). While the Department rejected the claim of the assessee, the Tribunal held that only part of the taxable income of the assessee can be treated as depreciation "actually allowed" and not the total depreciation which went into the computation of the total income. But the Tribunal remanded the matter back to the Officer on the basis of the submission made for the first time by the Department that the provisions of the Taxation Laws Order were applicable to the case and certain amounts of depreciation which are allowed under the Industrial Tax Rules (having the force of law in the Indore State), were required to be deducted in arriving at the written-down value.

On a reference, the High Court held that the Taxation Laws Order is a valid provision of law, but it will have application to the case only if the questions which the Tribunal has asked the Officer to determine, are determined by the Officer in favour of the Department. The assessee appealed.

Held, that the Tribunal had jurisdiction to permit the question of the applicability of paragraph 2 of the Taxation Laws Order to be raised for the first time in appeal.

The powers of the Tribunal in dealing with appeals are expressed in section 33 (4) of the Act in the widest possible terms. The word "thereon" of course, restricts the jurisdiction of the Tribunal to the subject-matter of the appeal. The words "pass such orders as the Tribunal thinks fit" include all the powers which are conferred upon the Appellate Assistant Commissioner by section 31 of the Act except possibly the power of enhancement. Consequently the Tribunal has authority to direct the Department to hold a further enquiry and dispose of the case on the basis of such enquiry.

The subject-matter of the appeal before the Tribunal was the question as to what should be the proper written-down value of the assets for calculating the depreciation under section 10 (2) (vi). It was certainly open to the Department, in the appeal filed by the assessee before the Tribunal, to support the finding of the Appellate Assistant Commissioner, with regard to the written-down value on any of the grounds decided against it. Even assuming that rules 12 and 27 of the Appellate Tribunal Rules, 1946 are not strictly applicable, the Tribunal has got sufficient power under section 33 (4) of the Act to permit the contention to be raised by the Department and to remand the matter. Rules 12 and 27 are not exhaustive of the powers of the Appellate Tribunal and are merely procedural in character and do not in any way circumscribe or control the power of the Tribunal under section 33 (4) of the Act.

Appeals from the Judgment and Order dated the 22nd June, 1962, of the Bombay High Court in I.T. Ref. No. 34 of 1960.

A. S. Bobde, Advocate, and *O. C. Mathur*, Advocate of *M/s. J. B. Dadachanji & Co.*, for Appellant (In C.As. Nos. 411 to 413 of 1965) and Respondent (In C. A. Nos. 414 and 415 of 1965).

A. S. Bobde, Advocate (*Gopal Singh* and *R. N. Sachthey*, Advocates, with him). for Respondent (In C.As. Nos. 411 to 413 of 1965) and Appellant (In C.As. Nos. 414 and 415 of 1965).

The Judgment of the Court was delivered by

Ramaswami, J.—These five appeals consolidated by an order of the Bombay High Court arise out of a Reference made by the Income-tax Appellate Tribunal, Bombay Bench 'A' on 2nd January, 1959, and decided by the Bombay High Court on 22nd September, 1962. The High Court granted certificates to appeal against its judgment under section 66-A of the Income-tax Act, 1922 to both the Commissioner of Income-tax, Central Bombay, and the assessee. Civil Appeals Nos. 411 to 413 of 1965 are brought on behalf of the assessee and Civil Appeals Nos. 414 and 415 of 1965 are brought on behalf of the Commissioner of Income-tax (Central Bombay).

Hukumchand Mills, Ltd., (hereinafter referred to as the "assessee" is a public company, incorporated in the previous Indore State. The assessee owns a textile mill there. Up to the assessment year 1949-50 it was being assessed in British India as a non-resident (except in 1948-49 when it was assessed as a resident), on such income as fell within section 4 (1) (a) or 4 (1) (c) read with section 42 of the Income-tax Act, 1922 (hereinafter referred to as the "Act"). After the Constitution came into force, Indore became a Part B State and the Act was brought into force in such States with effect from 1st April, 1950. The assessee therefore became liable to be assessed as a resident from the assessment year 1950-51.

The assessee was accordingly assessed as a resident in the years 1950-51, 1951-52 and 1952-53. One of the questions which arose for determination in the assessments for these years was the proper written-down value of the buildings, machinery, etc., of the assessee for calculating the depreciation allowance under section 10 (2) (vi) of the Act. The assessee relied upon section 10 (5) (b) and contended that the original cost of the machinery, buildings, etc., should be taken for this purpose. That sub-clause provided that in the case of assets acquired before the previous year the written-down value was the actual cost less all depreciation actually allowed to the assessee under the Act or any Act repealed thereby. But as no depreciation had been actually allowed under the Act, the assessee contended that the original cost should be taken as the basis of allowing depreciation without taking into consideration the number of years during which the machinery had been working or the depreciation it had suffered or the written-down value entered in the books. The case of the Department on the contrary, was that it was necessary to determine the total income of the assessee to arrive at the taxable proportionate income of the assessee under the Act as a non-resident and as depreciation had been allowed to arrive at such total income, the same must be taken into account to arrive at the written-down value as it had been actually allowed within the meaning of section 10 (5) (b). The Income-tax Officer and the Appellate Assistant Commissioner rejected the contention of the assessee but the Tribunal, by its order dated 8th October, 1958, held that only that part of the depreciation which entered into the computation of the taxable income of the assessee under the Act can be treated as depreciation "actually allowed" and not the total depreciation which went into the computation of the total income.

It was urged before the Tribunal by the Department that although the Income-tax Officer had not considered the provisions of paragraph 2 of the Taxation Laws (Part B States) (Removal of Difficulties) Order, 1950 (hereinafter referred to as the "Taxation Laws Order"), the said provisions were applicable in the present case and certain amounts of depreciation which are allowed under the Industrial Tax Rules,

which had the force of law in the Indore State, were required to be deducted in arriving at the written-down value of the assets of the assessee. The Tribunal permitted this contention to be raised by the Department. It was pointed out on behalf of the assessee that the contention could not be entertained unless it was found as a fact that the depreciation was actually allowed under the Industrial Tax Rules to the assessee, and unless it was also further held that the Industrial Tax Rules were rules which related to income-tax or super-tax, or any law relating to tax on profits of business. Paragraph 2 of the Taxation Laws Order provides as follows :—

"Computation of aggregate depreciation allowance and the written-down value.—In making any assessment under the Indian Income-tax Act, 1922, all depreciation actually allowed under any laws or rules of a Part B State relating to income-tax and super-tax or any law relating to tax on profits of business, shall be taken into account in computing the aggregate depreciation allowance referred to in sub-clause (c) of the proviso to clause (vi) of sub-section (2) and the written-down value under clause (b) of sub-section (5), of section 10 of the Act."

In view of this submission made by the parties the Tribunal remanded their matter back to the Income-tax Officer for ascertaining whether any depreciation was allowed under the Industrial Tax Rules and for considering the question whether the said rules related to income-tax or super-tax or any law relating to tax on profits of business and if he decided these questions in favour of the Department he should take into consideration such depreciation actually allowed under the said Rules for the purposes of computing the written-down value.

Under section 66 (1) of the Act the Tribunal referred the following questions of law for the determination of the High Court.

"(1) Whether the words 'all depreciation actually allowed' used in section 10 (5) (b) of the Indian Income-tax Act refer only to the depreciation allowed for the purpose of determining the amount liable to Indian income-tax ?

(2) Whether the provisions of paragraph 2 of the Taxation Laws (Part B States) (Removal of Difficulties) Order, 1950, apply and were correctly applied to the facts of the case ?"

By its judgment dated 22nd June, 1962, the High Court agreed with the view taken by the Tribunal on the first question and answered it in favour of the assessee. As regards the second question, the High Court held as follows :

"We do not find anything in the Tribunal's order which indicates that any contention was raised before the Tribunal that paragraph 2 had no application to the case. What was contended was that the questions whether any depreciation was allowed under the Industrial Tax Rules, or if it was so allowed, whether such depreciation was under any law or rules relating to income-tax or super-tax, etc., not having been determined, the contention raised by the Department on the basis of paragraph 2 of the Taxation Laws (Part B States) (Removal of Difficulties) Order, 1950, could not be entertained at that stage, and that contention has been accepted by the Tribunal. In these circumstances, our answer to Question No. 2 as framed is that Paragraph 2 of the Taxation Laws (Part B States) (Removal of Difficulties) Order, 1950, is a valid provision of law, but it will have application to the present case only if the questions which the Tribunal has asked the Income-tax Officer to determine, are determined by the Income-tax Officer in favour of the Department."

Civil Appeals Nos. 411 to 413 of 1965 :—

The sole question argued on behalf of the assessee in these appeals is that the Tribunal was not competent to go into the question whether the provisions of paragraph 2 of the Taxation Laws Order were applicable to the present case and the respondent should not have been allowed to raise the contention for the first time before the Tribunal. It was also argued that the Tribunal ought not to have remanded the case to the Income-tax Officer for ascertaining whether any depreciation was allowed under the Industrial Tax Rules and whether such depreciation should be taken into account for the purpose of computing the written-down value. In our opinion there is no justification for this argument. In the first place, no objection not have been allowed to raise the question for the first time with regard to the application of paragraph 2 of the Taxation Laws Order. We shall, however, assume in favour of the assessee that the question was implicit in the question actually framed and referred to the High Court. Even upon that assumption we are of opinion that the Tribunal had jurisdiction to permit the question to be raised for the first

time in appeal. The powers of the Tribunal in dealing with appeals are expressed in section 33 (4) of the Act in the widest possible terms. Section 33 (3) of the Act states that "An appeal to the Appellate Tribunal shall be in the prescribed form and shall be verified in the prescribed manner." Section 33 (4) reads as follows:—

"(4) The Appellate Tribunal may, after giving both parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, and shall communicate any such orders to the assessee and to the Commissioner."

The word "thereon", of course restricts the jurisdiction of the Tribunal to the subject-matter of the appeal. The words "pass such orders as the Tribunal thinks fit" include all the powers (except possibly the power of enhancement) which are conferred upon the Appellate Assistant Commissioner by section 31 of the Act. Consequently the Tribunal has authority under the section to direct the Appellate Assistant Commissioner or the Income-tax Officer to hold a further enquiry and dispose of the case on the basis of such enquiry. Rule 12 of the Appellate Tribunal Rules, 1946 made under section 5-A (8) of the Act provides as follows :

"The appellant shall not, except by leave of the Tribunal, urge or be heard in support of any ground not set forth in the memorandum of appeal ; but the Tribunal, in deciding the appeal, shall not be confined to the grounds set forth in the memorandum of appeal or taken by leave of the Tribunal under this rule :

Provided that the Tribunal shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of being heard on that ground."

Rule 27 states :

"The respondent, though he may not have appealed, may support the order of the Appellate Assistant Commissioner on any of the grounds decided against him."

Rule 28 is to the following effect :

"Where the Tribunal is of opinion that the case should be remanded, it may remand it to the Appellate Assistant Commissioner or the Income-tax Officer, with such directions as the Tribunal may think fit."

In the present case, the subject-matter of the appeal before the Tribunal was the question as to what should be the proper written-down value of the buildings, machinery, etc., of the assessee for calculating the depreciation allowance under section 10 (2) (vi) of the Act. It was certainly open to the Department, in the appeal filed by the assessee before the Tribunal, to support the finding of the Appellate Assistant Commissioner with regard to the written-down value on any of the grounds decided against it. It was argued on behalf of the appellant that the action of the Tribunal in remanding the case is not strictly justified by the language of rule 27 or rule 12. Even assuming that rules 12 and 27 are not strictly applicable, we are of opinion that the Tribunal has got sufficient power under section 33 (4) of the Act to entertain the argument of the Department with regard to the application of paragraph 2 of the Taxation Laws Order and remand the case to the Income-tax Officer in the manner it has done. It is necessary to state that rules 12 and 27 are not exhaustive of the powers of the Appellate Tribunal. The rules are merely procedural in character and do not, in any way, circumscribe or control the power of the Tribunal under section 33 (4) of the Act. We are accordingly of the opinion that the Tribunal had jurisdiction to entertain the argument of the Department in this case and to direct the Income-tax Officer to find whether any depreciation was actually allowed under the Industrial-tax Rules and whether such depreciation should be taken into consideration for the purpose of computing the written-down value.

For these reasons we reject the argument of Mr. Bobde on behalf of the assessee and dismiss these appeals. There will be no order as to costs.

Civil Appeals Nos. 414 to 415 of 1965 :—

The question of law arising in these appeals has been the subject-matter of consideration in the decision of this Court in *Commissioner of Income-tax, Madhya Pradesh, Indore and Bhandara v. Nandlal Bhandari Mills Ltd.*¹ and for the reasons

given in that case we hold that the question has been correctly answered by the High Court. We accordingly dismiss these appeals but there will be no order as to costs.

V. S.

Orders accordingly.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—J. C. SHAH, V. RAMASWAMI AND V. BHARGAVA, JJ.

Commissioner of Income-tax, Gujarat

... Appellant*

v.

Kantilal Nathuchand Sami

... Respondent.

Income-tax Act (XI of 1922), sections 10, 23 (1), (3), (4), (5) (a), 24 (1) first and second Provisos, 24 (2) and Proviso (c) to section 24 (2)—Loss—Carry-forward and set-off—Registered firm—Speculation loss—Whether apportionable between partners—Firm, whether entitled to carry-forward and set-off.

The respondent, a firm registered under section 26-A of the Indian Income-tax Act, 1922 earned income from property, ready business in kappas, and also from speculation business carried on on an extensive scale. During the assessment year 1958-59 the income from property was assessed at Rs. 1,369 and from ready business at Rs. 28,449. There was a loss of Rs. 6,26,606 in the speculation business. The Income-tax Officer charged tax on the total of the income from property and ready business which amounted to Rs. 29,818. The loss of Rs. 6,26,606 was not set-off against this profit in view of the provisions of the first proviso to section 24 (1) of the Income-tax Act, but was apportioned between the partners by the Income-tax Officer purporting to act under the second proviso to section 24 (1). Similarly in the next assessment year 1959-60, where there was income from property and loss in ready business as well as speculation business no tax was imposed but net loss of Rs. 1,239 worked out on the basis of loss in ready business reduced by the income from property was apportioned between the partners. Further the speculation loss of Rs. 5,416 was also apportioned between the partners on the same basis as was done in the preceding assessment year 1958-59. In the assessment year 1960-61 there was an income of Rs. 1,014 from property, a loss of Rs. 21,197 from ready business and a profit of Rs. 6,19,784 in speculation business. The respondent claimed carry-forward of the speculation loss of the two prior years for set-off as against its speculation profit of the third year. The claim was rejected by the Income-tax Officer and the Appellate Assistant Commissioner as being opposed to the provisions of section 24, but the claim was upheld by the Tribunal in further appeal. The High Court on reference, upheld the view of the Tribunal. On appeal to the Supreme Court,

Held, that the speculation losses of the respondent for the assessment years 1958-59 and 1959-60 should be set-off against its speculation profit in its assessment for the assessment year 1960-61.

Speculative loss sustained by a registered firm cannot be apportioned amongst the partners under the second proviso to section 24 (1).

The only interpretation that can be placed on the words "any such loss" in the first part of the second proviso to section 24 (1) is that this expression refers to the loss as determined for purposes of the principal clause of section 24 (1) read with the first proviso, and thus, does not comprise within it loss incurred in speculative business referred to in the first proviso.

The words "any loss" in the second part of the second proviso to section 24 (1) also refer to the loss computed for the purposes of the principal clause of section 24 (1) taken together with the first proviso so that it must also exclude the loss in speculative business which is not to be taken into account when computing the total income of the assessee.

The first proviso to section 23 (5) (a) cannot be held to be applicable to loss in speculative business kept apart under the first proviso to section 24 (1). The first proviso to section 23 (5) (a) does not refer to the loss incurred by a registered firm in speculative business which is not to be taken into account when computing the total income of the registered firm under section 23 (1) (3) and (4) of the Act. Section 23 (5) (a) clearly applies only to the total income of the firm which has been assessed under sub-section (1), sub-section (3) or sub-section (4) of section 23 and does not apply to any other income or loss.

Proviso (c) to section 24 (2) prohibits a claim being made by a registered firm as such to set-off loss in the future year against profits in that year, which loss has been apportioned between the partners

under the proviso to section 24 (1). That loss would be the loss taken into account in computing the total income under section 23 in view of the principal clause of section 24 (1) read with the first proviso to it and will thus exclude the speculative loss which is not taken into account. The language of this part of the proviso clearly envisages that there could be loss which has not been apportioned between the partners of a registered firm, so that the registered firm can claim to have it carried forward and set-off in future years. Clearly that can only be the loss in speculative business of the registered firm which is not taken into account when computing the total income of the firm under section 23 in view of section 24 (1).

The fact that proviso (c) to section 24 (2) envisages the existence of loss which has not been apportioned between the partners strengthens the conclusion that the second proviso to section 24 (1) does not cover loss in speculative business, and consequently, does not permit that loss to be apportioned between the partners.

Appeal from the Judgment and Order dated the 13th/16th September, 1963, of the Gujarat High Court in Income-tax Reference No. 2 of 1963.

B. Sen, Senior Advocate (*T. A. Ramachandran*, Advocate, and *S. P. Nayyar*, Advocate, for *R. N. Sachthey*, Advocate, with him), for Appellant.

K. R. Chaudhuri and *K. Rajendra Chaudhuri*, Advocates, for Respondents.

The Judgment of the Court was delivered by

Bhargava, J.—The respondent is a firm which, for purposes of assessment under the Income-tax Act (hereinafter referred to as the Act) was registered under section 26-A of the Act during the assessment years 1958-59, 1959-60, and 1960-61. The respondent was earning income from property, ready business in kappas, and also from speculation business carried on on an extensive scale. During the assessment year 1958-59, the income from property was assessed at Rs. 1,369 and from ready business at Rs. 28,449. There was a loss of Rs. 6,26,606 in the speculation business. The Income-tax Officer, in making the assessment for that year, charged tax on the total of the income from property and ready business which amounted to Rs. 29,818. The loss of Rs. 6,26,606 was not set-off against this profit in view of the provisions of the first proviso to section 24 (1) of the Act. This loss was, however, apportioned between the partners by the Income-tax Officer, purporting to act under the second proviso to the said sub-section. Similarly, in the next assessment year 1959-60, where there was income from property and loss in ready business as well as speculation business, no tax was imposed, as the loss in ready business exceeded the income from property. The net loss of Rs. 1,239 worked out on the basis of loss in ready business reduced by the income from property, was apportioned between the partners. Further, the speculation loss of Rs. 5,416 was also apportioned between the partners on the same basis as was done in the preceding assessment year 1958-59. In the assessment year 1960-61, there was an income of Rs. 1,014 from property, and a loss of Rs. 21,197 from ready business. In addition, there was a profit of Rs. 6,19,784 in the speculation business. Since this year there was a profit in speculation business the first proviso to section 24 (1) did not apply, and the net income of the respondent was worked out by taking all the three figures into account. The respondent claimed that in the assessment of the respondent's income in this year, the respondent was entitled to set-off speculation losses of the two preceding assessment years 1958-59 and 1959-60 against the profits earned from speculation business in this year, urging that the Income-tax Officer in the two earlier years was wrong in apportioning the loss between the partners. The plea was that under the second proviso to section 24 (1), this loss in speculation business could not be apportioned between the partners, and consequently under section 24 (2), the respondent was entitled to carry forward this loss and to have it set-off against the profit from speculation business under clause (i) of section 24 (2). This plea was rejected by the Income-tax Officer whose order was upheld by the Appellate Assistant Commissioner. On further appeal, the Income-tax Appellate Tribunal, however, accepted the plea of the respondent and held that the speculation losses sustained by the respondent in the

two preceding assessment years must be adjusted against the profit earned in the account year in question in speculation business. Thereupon at the request of the Commissioner of Income-tax the following question of law was referred by the Tribunal for the opinion to the High Court of Gujarat.

"Whether on the facts and in the circumstances of the case and on a true interpretation of the various provisions of the Indian Income-tax Act, 1922, the Tribunal was correct in holding that speculation losses of the respondent-firm (assessee-firm) for the assessment years 1958-59 and 1959-60 should be set-off against its speculation profit of Rs. 6,19,784 in its assessment for the assessment year 1960-61."

The High Court upheld the view of the Tribunal and answered the question in favour of the respondent. This appeal has now been brought up to this Court by the Commissioner of Income-tax on certificate granted by the High Court under section 66-A (2) of the Act.

The answer to the question referred to the High Court obviously depends on the interpretation of the second proviso to section 24 (1) of Act. In interpreting this provision, the purpose of section 24 (1) and (2) has to be kept in view. Under the Act, the Income-tax Officer has to determine the total income of an assessee under section 23 (1), (3) or (4) of the Act. In determining this total income, under all the various heads enumerated in section 6 has to be taken into account. Sections 7 to 10 and 12 lay down the principles on which the income under these various heads is to be computed. In the case of income from business, profession or vocation, the income has to be computed under section 10 (1) of the Act. Section 10 (2) of the Act lays down certain deductions which have to be made in computing the profits and gains from business, profession or vocation. It is during this computation to be made by the Income-tax Officer under section 23 of the income from business, profession or vocation in accordance with section 10 (1) of the Act that the Income-tax Officer is further required to apply the provisions of section 24. Section 24 is, thus, a provision laying down the manner of computation of total income. The principal clause of section 24 (1) lays down that if there be a loss of profits or gains in any year under any of the heads mentioned in section 6, that loss has to be set-off against the income, profits or gains of the assessee under any other head in that year. If this provision had stood by itself without any provisions, the result would have been that all losses incurred by an assessee under any of the heads mentioned in section 6 would be adjusted against profits under all other heads, and then the total income of the assessee would be worked out on that basis. The first proviso to this sub-section, however, lays down an exception to this general rule contained in the principal clause. The exception relates to income from business consisting of speculative transactions, and places the limitation that losses sustained in speculative transactions are not to be taken into account in computing the profits and gains chargeable under the head "profits and gains of business, profession or vocation", except to the extent that they will be set-off against profits and gains in any other business which itself consists of speculative transactions. The effect of the proviso is that if there are profits in speculative business, those profits are added to income under other heads mentioned in section 6 for purposes of computing the total income of the assessee in order to determine the tax under section 23 of the Act. On the other hand, losses in speculative business are not to be taken into account when computing the total income, except to the extent to which they can be set-off against profits from other speculative business. The first proviso, thus, clearly limits the applicability of the principal clause of section 24 (1); and, when applied, it governs the manner in which the total income of the assessee is to be computed. In the case before us, the Income-tax Officer was clearly right in the assessment years 1958-59 and 1959-60 in not setting-off the losses in the speculative business against the income earned in those years either from property or from ready business in kappas.

Then comes the second proviso, and it is clear from the language of this proviso that it does not deal with the computation of the income of the assessee for purposes of determining the total income. This second proviso was incorporated in order to indicate the personality of the assessee for the purpose of applying the principal

clause of section 24 (1) taken together with the first proviso. No difficulty could arise in applying the principal clause and the first proviso together in the case of individuals, companies, Hindu undivided families, etc., but a provision was needed for cases where the assessee happened to be a firm. This necessity arose because of the special manner laid down in section 23 itself for assessing the income of a firm. That section lays down different rules for assessment of unregistered firms and registered firm. In the case of an unregistered firm, the total income computed by the Income-tax Officer for determining the tax can be assessed by apportioning that income between the partners, and determining the tax payable by each partner on the basis of such assessment, including his income from other sources, as laid down in section 23 (5) (b) of the Act. In the alternative, the Income-tax Officer may choose to assess an unregistered firm as a unit by itself, and in that case, the tax is determined as payable by the firm as a unit, so that the provisions of section 23 (5) (b) are not applied. The second proviso to section 24 (1) lays down that in such a case where an unregistered firm is not assessed under the provisions of clause (b) of subsection (5) of section 23 "any such loss shall be set-off only against the income, profits and gains of the firm and not against the income, profits and gains of any of the partners of the firm." It is clear that the expression "any such loss" in this part of the second proviso can only refer to the loss computed for purposes of applying the principal clause of section 24(1) taken together with the first proviso. That will, therefore, be the loss suffered by the unregistered firm in businesses other than speculative business. The loss incurred in the speculative business by the unregistered firm is, thus, to be ignored. If this part of the second proviso were to be interpreted as laying down that the loss mentioned therein includes the loss from speculative business, the effect would be that the provision contained in the first proviso would be completely nullified. The effect of the first proviso is that when setting-off the loss of profits and gains under one head against income, profits and gains under any other heads in accordance with the principal clause, the loss suffered in speculative business is not to be taken into account and is to be kept apart. If the word "loss" in the first part of the second proviso were to be interpreted as including the loss in speculative business also, the result would be that the loss excluded under the first proviso would be included in the assessment of total income under the second proviso. In the circumstances, the only interpretation that can be placed on the words "any such loss" in this part of the second proviso is that this expression refers to the loss as determined for purposes of the principal clause of section 24 (1) read with the first proviso, and, thus, does not comprise within it loss incurred in speculative business referred to in the first proviso.

Then comes the second part of the second proviso which prescribes the personality of the assessee to which the provisions of section 24 are to be applied in cases where the assessee is a registered firm. Under this part, the loss, which cannot be set-off against other income profits, and gains of the registered firm, is to be apportioned between the partners of the firm and they alone are entitled to have the amount of the loss set-off under this section. Clearly, in this part also, the words "any loss" must refer to the loss computed for purposes of the principal clause taken together with the first proviso, and will, therefore, not comprise in it the loss in speculative business which is not to be taken into account under the first proviso. The aspect of this provision, which is of importance, is that under it, the Income-tax Officer is required to take two steps. The first is that the loss, which cannot be set-off against other income, profits and gains of the registered firm, has to be apportioned between the partners of the firm, and then he has to give effect to the right of the partners to have the amounts of the loss set-off under this section. Once again, if this part of the second proviso were interpreted to include within it the loss in speculative business which is not to be taken into account under the first proviso, the effect of giving a wider meaning to the words "any loss" in it would be that the same loss in speculative business would, after apportionment, be set-off against income, profits and gains under other heads in computing the total income of the partners. The result would be that the effect of the first proviso would again be nullified by this part

of the second proviso. Consequently, the correct interpretation must be that the words "any loss" in this part of the second proviso also refer to the loss computed for the purposes of the principal clause of section 24 (1) taken together with the first proviso, so that it must also exclude the loss in speculative business which is not to be taken into account when computing the total income of the assessee. The language used in the second proviso, thus, itself leads to the conclusion that the decision arrived at by the High Court was correct, even though on a different reasoning.

In this connection, learned Counsel appearing for the Commissioner drew our attention to the first proviso to section 23 (5) (a) of the Act, under which the share of a partner in a loss is required to be set-off against his other income, or carried forward and set-off in accordance with the provisions of section 24. We do not think that this proviso refers to the loss incurred by a registered firm in speculative business which is not to be taken into account when computing the total income of the registered firm under section 23 (1), (3) and (4) of the Act. Section 23 (5) (a) clearly applies only to the total income of the firm which has been assessed under sub-section (1), sub-section (3) or sub-section (4) of section 23 and does not apply to any other income or loss. If speculative business of a firm has resulted in profit, that profit, as we have indicated earlier, would be taken into account when determining the total income of that firm. But if there be a net loss in all speculative businesses taken together, that loss is not to be taken into account when computing the total income, and consequently, that loss would be outside the scope of section 23 (5) (a) also. The first proviso to section 23 (5) (a) cannot be, therefore, held to be applicable to loss in speculative business kept apart under the first proviso to section 24 (1).

Coming to sub-section (2) of section 24 on which reliance was placed by learned Counsel for the Commissioner, we find that, instead of supporting the interpretation sought to be put on behalf of the Commissioner on the second proviso to section 24 (1) it supports the view which we have arrived at on interpretation of the language of section 24 (1) and its proviso. Clause (i) of section 24 (2) lays down that where the loss was sustained by an assessee in a business consisting of speculative transactions, it shall be set-off only against the profits and gains, if any, of any business in speculative transactions carried on by him in that year. This is a general provision which is applicable to loss in speculative business suffered by any assessee including a firm and the limitation that it places is that speculative loss, kept apart under section 24 (1) and not set-off against the income, profits and gains of that earlier year, is only to be set-off in a subsequent year, if there are profits in speculative transactions of the same business. This provision is also, however governed by some provisos, including proviso (c) which lays down that :

"Nothing herein contained shall entitle any assessee, being a registered firm, to have carried forward and set-off any loss which has been apportioned between the partners, under the proviso to sub-section (1), or entitle any assessee, being a partner in an unregistered firm which has not been assessed under the provisions of clause (b) of sub-section (5) of section 23 to have carried forward and set-off against his own income any loss sustained by the firm".

This proviso is again divisible into two parts. One part relates to the case of an unregistered firm and lays down an absolute prohibition against setting-off of loss carried forward in the assessment of a partner of an unregistered firm, which has been assessed as a separate unit, by omitting to apply the provisions of clause (b) of sub-section (5) of section 23. This part, does not envisage that, in the case of such an unregistered firm, there would be any loss which could be apportioned between the partners. In the case of a registered firm, however, the provision made is in different language. It lays down that :

"Nothing herein contained shall entitle any assessee, being a registered firm, to have carried forward and set-off any loss which has been apportioned between the partners, under the proviso to sub-section (1)."

Thus, it prohibits a claim being made by a registered firm as such to set-off loss in the future year against profits in that year, which loss has been apportioned between

the partners under the proviso to section 24 (1). That loss would be the loss taken into account in computing the total income under section 23 in view of the principal clause of section 24 (1) read with the first proviso to it and will, thus, exclude the speculative loss which is not taken into account. The language of this part of the proviso clearly envisages that there could be loss which has not been apportioned between the partners of a registered firm, so that the registered firm can claim to have it carried forward and set-off in future years. Clearly, that can only be the loss in speculative business of the registered firm which is not taken into account, when computing the total income of the firm under section 23, in view of section 24 (1). No question could have arisen of the Legislature recognising the possibility of a firm claiming set-off of any loss incurred in an earlier year if, as contended on behalf of the Commissioner, even the loss in speculative business were to be apportioned between the partners under the second proviso to section 24 (1). On the interpretation sought to be placed on behalf of the Commissioner, loss, other than loss in speculative business, has to be set-off against the income, profits and gains under any head of the assessee in view of section 24 (1) read with its first proviso, while loss in speculative business would also have to be apportioned under the second proviso leaving no loss unapportioned between the partners. The fact that proviso (c) to section 24 (2) envisages the existence of loss which has not been apportioned between the partners clearly strengthens our view that the second proviso to section 24 (1) does not cover loss in speculative business, and consequently, does not permit that loss to be apportioned between the partners. Thus, section 24 (2) also leads to the same conclusion which we have arrived at above on the interpretation of the language of section 24 (1).

In view of the reasons given by us above, we are unable to agree with the reasoning adopted by the Bombay High Court in *Commissioner of Income-tax, Bombay City I v. Chimanlal J. Dalal & Co.*¹, and cannot accept the view of that Court that the decision given in the present case by the Gujarat High Court was incorrect.

The appeal, therefore, fails and is dismissed with costs.

T.K.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

PRESENT:—J. C. S IAH, V. RAMASWAMI AND V. BHARGAVA, JJ.

Commissioner of Income-tax, Mysore

.. *Appellant**

v.

The Canara Bank, Ltd.

.. *Respondent.*

Income-tax Act (XI of 1922)—Capital receipt or revenue receipt—Banking company having branch in Pakistan—Devaluation of Indian Rupee—Amount belonging to head office lying at branch in Pakistan on date of devaluation—“Blocked” and “sterilised” and not utilised in banking operation—Remittance to India after grant of permission—Profit realised by bank on account of fluctuation in exchange rate—Nature of receipt.

The respondent-bank opened a branch in Karachi on 15th November, 1946. After the partition of India in 1947 the currencies of the two dominions of India and Pakistan continued to be at par until there was a devaluation of the Indian Rupee on 18th September, 1949. On that date the Karachi Branch had with it a sum of Rs. 3,97,221 belonging to its head office. The exchange ratio between the two countries was not determined until 27th February, 1951. Owing to the difficulties of the currency situation it was impossible to remit the amount to the head office for quite a long time. On 1st July, 1953 the State Bank of Pakistan permitted its remittance to India. For the period from the devaluation of the Indian Rupee upto the time of its remittance to India, i.e., between September, 1949 and July, 1953 the amount was a “blocked” and “sterilised” balance and the bank was unable to deal with that amount or use it for any banking purpose. The remittance took place on 3rd July, 1953. On account of the fluctuation in the exchange rate the respondent-bank made a profit of Rs. 1,70,746. For the assessment year 1954-55, the respondent-bank claimed that this amount was a capital receipt and not taxable. The Income-tax Officer rejected the claim holding that the amount

1. (1965) 57 I.T.R. 285 : (1966) 1 I.T.J. 721.

* C.A. No. 675 of 1965.

13th October, 1966.

was a revenue receipt. The order of the Income-tax Officer was upheld by the Appellate Assistant Commissioner and the Tribunal. The High Court on reference reversed the finding of the Tribunal and held that the exchange difference of Rs. 1,70,746 was not assessable to income-tax under any provision of the Indian Income-tax Act. On appeal to Supreme Court,

Held, that the exchange difference of Rs. 1,70,746 was not assessable to income-tax and the appreciation of the money did not arise in the course of any trading operation.

If by virtue of exchange operations profits are made during the course of business and in connection with business transactions, the excess receipts on account of conversion of one currency into another would be revenue receipts. But if the profit by exchange operations comes in not by way of business of the bank, the profit would be capital profit.

Held on facts : Even assuming that the amount of Rs. 3,97,221 was stock-in-trade of the respondent bank, it does not necessarily follow that the increment due to the fluctuation in the exchange rate was due to trading operations in the carrying on of the banking business.

The money changed its character of stock-in-trade when it was "blocked" and "sterilised" and the increment in its value owing to the exchange fluctuation must be treated as a capital receipt.

Appeal from the Judgment and Order dated the 11th December, 1961 of the Mysore High Court in I.T.Ref. Case No. 13 of 1959.

R.M. Hazarnavis, Senior Advocate (*R. Ganapathy Iyer* and *R.N. Sachithy*, Advocates, with him), for Appellant.

A.K. Sen, Senior Advocate (*G.L. Sanghi*, Advocate, and *B.R. Agarwal*, Advocate of *M/s. Gagrati & Co.*, with him), for Respondent.

The Judgment of the Court was delivered by

Ramaswami, J.—This appeal is brought, by certificate, from the judgment of the High Court of Mysore dated 11th December, 1961 in Income-tax Reference Case No. 13 of 1959. The respondent (hereinafter referred to as the bank) is a public limited company carrying on business of banking at its head office in Mangalore and its branches in various places. It opened one branch in Karachi on 15th November, 1946. After the partition of India in 1947, the currencies of the two dominions of India and Pakistan continued to be at par until there was a devaluation of the Indian Rupee on 18th September, 1949. As Pakistan did not devalue her rupee, the old parity of the Pakistan and Indian Rupee ceased to exist. The exchange ratio between the two countries was not determined until 27th February, 1951. On this date it was agreed that a hundred Pakistani Rupees were equivalent to a hundred and forty-four Indian Rupees. On the date of devaluation of the Indian Rupee the Karachi Branch of the bank had with it a sum of Rs. 3,97,221 belonging to its head office. Owing to the difficulties of the currency situation it was impossible to remit the amount to the head-office for quite a long time. On 1st July, 1953, the State Bank of Pakistan permitted its remittance to India. In terms of Indian currency the said amount became equivalent to Rs. 5,71,038. Thus there was an appreciation of the value of the amount remitted from the Karachi branch and the bank made a profit of Rs. 1,73,817. After making certain deductions, the head-office of the bank transferred a sum of Rs. 1,70,746 to its Contingencies Reserve Account. In its return for the assessment year 1954-55, the bank claimed that this sum was a capital gain and was not taxable. By his order dated 9th February, 1955 the Income-tax Officer rejected the claim holding that the said amount of Rs. 1,70,746 was a revenue receipt. The order of the Income-tax Officer was affirmed by the Appellate Assistant Commissioner in appeal. The bank took the matter in further appeal to the Income-tax Appellate Tribunal which rejected the appeal by its order dated 23rd November, 1956. At the instance of the bank the Income-tax Appellate Tribunal referred the following question of law for the determination of the High Court :

"Whether the aforesaid exchange difference of Rs. 1,70,746 is assessable under any of the provisions of the Indian Income-tax Act ?"

By its order dated 11th December, 1961 the High Court reversed the finding of the Appellate Tribunal and held that the exchange difference of Rs. 1,70,746 was not assessable to income-tax under any provision of the Indian Income-tax Act.

The question involved in this appeal is whether the profit of the bank on account of fluctuation of exchange arose in the course of trading operation of the bank or whether it was incidental to any such trading operation. If by virtue of exchange operations profits are made during the course of business and in connection with business transactions, the excess receipts on account of conversion of one currency into another would be revenue receipts. But if the profit by exchange operations comes in, not by way of business of the bank, the profit would be capital profit. In the present case, the High Court has found, after an analysis of the relevant facts, that the appreciation of the money did not arise in the course of any trading operation. In the year 1949 when there was a devaluation of the Indian rupee, the Karachi Branch of the bank was not carrying on any business in foreign currencies. It has been found by the Appellate Tribunal that until 3rd April, 1951 when the bank was permitted to carry on business in Pakistan currency it carried on no foreign exchange business. Even after such permission was granted and even after the bank obtained on 25th April, 1953 a general licence to carry on business in all foreign currencies the money of the head-office was not used for any business in foreign currencies. The Appellate Tribunal has found that the money was lying idle in the Karachi Branch and it was not utilised in any banking operation and the Karachi branch was merely keeping that money with it for the purpose of remittance to India and awaiting permission of the State Bank of Pakistan. The State Bank of Pakistan granted the permission on 1st July, 1953, and the remittance actually took place two days later, i.e., on 3rd July, 1953. It has been found by the Appellate Tribunal that the sum of money was at no material time employed, expended or used for any banking operation or for any foreign exchange business. In the Supplementary Statement of The Case the Appellate Tribunal stated that

"during the period 3rd April, 1951 to 25th April, 1953, there were dealings between India and Pakistan offices of the bank, such as opening of letters of credit, issuing of drafts etc."

and

"That all these operations were effected in a new account which was opened and the old balance of Rs. 3,97,221 could not be utilised as per instructions of the State Bank of Pakistan."

According to the agreed Statement of The Case the amount of Rs. 3,97,221 was "blocked" and "sterilised" for the period from the devaluation of the Indian Rupee upto the time of its remittance to India. In the context of these facts the High Court took the view that the appreciation of the value of the money did not arise in the course of the trading operation of the bank and was not therefore taxable as revenue receipt. On behalf of the appellant Mr. Hazarnavis submitted that the Appellate Tribunal was wrong in holding that there was blocking or sterilisation of the amount. Learned Counsel said that the balance-sheets of the Revenue account of the Karachi Branch would show that the amount of Rs. 3,97,221 was not lying idle in the Karachi Branch but was utilised by it for internal banking operations within Pakistan. We did not, however permit Mr. Hazarnavis to produce additional evidence in this Court for controverting the findings of fact reached by the Appellate Tribunal. It is a matter of significance that the original Statement of The Case dated 15th May, 1957, and Supplementary Statement of The Case dated 14th August, 1959, were both agreed statements. Before the High Court also the findings of the Appellate Tribunal were not challenged on behalf of the Commissioner of Income-tax. On the other hand, it appears that it was conceded by the appellant before the High Court that there was no evidence that the "blocked" balance was, in fact, employed by the Karachi branch for the internal banking operations in Pakistan or for its business in Pakistan and other foreign currencies. It is therefore not permissible for the appellant at this stage to go behind the two Statements of The Case and to challenge the findings of fact contained therein. The argument was also stressed by Mr. Hazarnavis that the money was a "stock-in-trade" of the bank and an increment of Rs. 1,70,746 due to the fluctuation in the exchange

rate must therefore be treated as incidental to the business of the bank. We shall assume in favour of the appellant that the money was "stock-in-trade" of the bank. But it does not necessarily follow that the increment due to the fluctuation in the exchange rate was due to trading operations in the carrying on of the banking business. On the contrary, it has been found by the Appellate Tribunal that the amount of Rs. 3,97,221 was a "blocked" and "sterilised" balance and the bank was unable to deal with that amount or use it for any banking purpose between September, 1949 and July, 1953 when it was finally remitted to India. In our opinion, the money changed its character of "stock-in-trade" when it was "blocked" and "sterilised" and the increment in its value owing to the exchange fluctuation must be treated as a capital receipt. It has also been found by the Appellate Tribunal that the said amount of Rs. 3,97,221 was not utilised for internal banking operations within Pakistan and it is hence not possible to draw an inference that the bank realised any profit in the carrying out of its business. We accordingly hold that Mr. Hazarnavis is unable to make good his argument on this aspect of the case and the High Court was right in reaching the conclusion that the exchange difference of Rs. 1,70,746 was not assessable to income-tax.

In the course of his argument Mr. Hazarnavis relied upon the decision of the Court of Appeal in *Imperial Tobacco Company v. Kelly*¹. In that case, a tobacco manufacturing company in England with a view to buying tobacco leaf in the U.S.A. during the leaf season, used to provide itself with dollar currency in advance by purchasing the same beforehand. On the outbreak of war, owing to Governmental restrictions the company had to suspend its buying operations in U.S.A. Later, the British Treasury requisitioned the accumulated dollars and paid the company sterling in exchange. The dollars in the meantime having appreciated in value, the company got more sterling than what it originally laid out. It was held by the Court of Appeal that the excess receipts were profits assessable to income-tax and the acquisition of the dollars was the first step in the commercial transaction of the company. The dollar was a "commodity" of the company and it became a surplus stock to the company's requirements on the restriction on purchase and its original revenue character would not be altered by the circumstance of the Governmental controls requisitioning the dollars. Mr. Hazarnavis also referred to the decision in *Landes Brothers v. Simpson*², where a similar view was taken. On the contrary, Counsel for the respondent relied upon the decision in *McKinlay (H.M. Inspector of Taxes) v. H.T. Jenkins & Son, Ltd.*³ in which it was held that the profit by exchange operations would be capital profit if the profit did not come in by way of business but by means of an investment in foreign currencies. In that case, a British company carrying on business in marbles, bought Italian Liras in advance with which to pay in Italy for marbles to be purchased there. But before the time came for purchase, finding that the Lira had appreciated, it sold away the Liras at a profit, and bought a second instalment of Liras to fulfil its contract in time. It was held by Rowlatt, J., that the first instalment of Liras should be regarded as capital lying idle and that the conversion thereof was a speculative transaction in capital. Reference was also made to the decision in *Davies v. The Shell Company of China Ltd.*⁴. But the decision in none of these cases is exactly in point, for the material facts in the present case are different. The question of law arising in the present case must be decided on the particular facts and circumstances found by the Appellate Tribunal.

For the reasons already expressed we hold that the High Court has correctly answered the question referred to it and this appeal must be dismissed with costs.

T.K.K.

Appeal dismissed.

1. (1943) 25 T.C. 292.

2. (1934) 19 T.C. 62.

3. (1926) 10 T.C. 372.

4. (1951) 32 T.C. 133 : (1952) 22 I.T.R. (Supp.) 1.

THE SUPREME COURT OF INDIA.

PRESENT :—J.C. SHAH, V. RAMASWAMI AND V. BHARGAVA, JJ.

Kantamani Venkata Narayana & Sons

.. Appellants*

v.

First Additional Income-tax Officer, Rajahmundry

.. Respondent.

Income-tax Act, (XI of 1922), section 34.—Reassessment—Notice—Clause under which notice is issued, whether should be specified—Duty of assessee to disclose material facts—Production of books of accounts or other evidence—Whether sufficient.

The assessee, a Hindu undivided family, was assessed to tax on income derived principally from money-lending. In the course of proceedings for assessment of a private limited company styled "Motu Industries, Ltd.", the Income-tax Officer discovered that there was a large accretion to the wealth of the assessee which had not been disclosed in the proceedings for its assessment. On 12th March, 1959, the Income-tax Officer issued a notice seeking to reopen the assessment for the year 1950-51. The assessee filed a return under protest. On 14th March, 1960, the Income-tax Officer issued notice of reassessment for the year 1951-52 and on 19th December, 1960 the Income-tax Officer intimated the reasons that had prompted him to issue the notices of reassessment. On 24th March, 1962, the Income-tax Officer issued notices under section 34 of the Indian Income-tax Act, 1922 for reassessment of income for the years 1940-41 to 1949-50. The assessee filed petitions in the High Court for writs of prohibition to refrain the Income-tax Officer from proceeding under the said notices. The petitions were rejected by a single Judge and his order was confirmed in appeal by a Division Bench. The assessee appealed with Special Leave to the Supreme Court,

Held, that it is not necessary or imperative that a notice under section 34 must specify under which of the two clauses, clause (a) or clause (b) of sub-section (1) of section 34, the notice is issued. The main notice to be issued in a case under section 34 is the notice under section 22 (2) and section 34 merely authorises the issue of such a notice.

It is clearly implicit in the terms of sections 23 and 34 that the assessee is under a duty to disclose fully and truly material facts necessary for the assessment of the year and that the duty is not discharged merely by the production of the books of accounts or other evidence. It is the duty of the assessee to bring to the notice of the Income-tax Officer particular items in the books of account or portions of documents which are relevant. Even if it be assumed that from the books produced the Income-tax Officer, if he had been circumspect, could have found out the truth, the Income-tax Officer may not on that account be precluded from exercising the power to assess income which had escaped assessment.

Appeals by Special Leave from the Judgment and Order dated the 3rd February, 1965, of the Andhra Pradesh High Court in Writ Appeals Nos. 117 to 128 of 1964.

P. Ram Reddy, Senior Advocate (*A. V. V. Nair*, Advocate, with him), for Appellants (in all appeals).

S. V. Gupte, Solicitor-General of India (*R. Ganapathy Iyer* and *R. N. Sachthey*, Advocates, with him), for Respondent (in all appeals).

The Judgment of the Court was delivered by

Shah, J.—M/s. Kantamani Venkata Narayana & Sons hereinafter referred to as "the assessee" is a Hindu undivided family, which was assessed to tax on income derived principally from money-lending. In the course of proceedings for assessment of a private limited company styled "Motu Industries, Ltd." the Income-tax Officer, Rajahmundry, discovered that there was a large accretion to the wealth of the assessee which had not been disclosed in the proceedings for its assessment. On 12th March, 1959, the Income-tax Officer issued a notice seeking to reopen the assessment for the year 1950-51. The assessee filed a return under protest. On 14th March, 1960, the Income-tax Officer issued notice of re-assessment for the year 1951-52, and on 19th December, 1960, the Income-tax Officer intimated the reasons that had prompted him to issue the notices of re-assessment. On 24th

March, 1962, the Income-tax Officer issued notices under section 34 for reassessment of income of the assessee for the years 1940-41 to 1949-50. The assessee then presented petitions in the High Court of Andhra Pradesh for writ of *prohibition* directing the Income-tax Officer to refrain from proceeding in pursuance of the notices for the assessment years 1940-41 to 1949-50 and 1950-51 and 1951-52. A single Judge of the High Court rejected the petitions and the order was confirmed in appeal by a Division Bench of the High Court. The assessee has appealed with Special Leave.

The notice issued by the Income-tax Officer did not specifically refer to section 34 (1)(a) of the Income-tax Act; it did not set out the clause under which it was issued. But on that account the proceeding under section 34 is not vitiated. It was held by the Calcutta High Court in *P. R. Mukherjee v. Commissioner of Income-tax, West Bengal*¹, that it is not necessary or imperative that a notice under section 34 must specify under which of the two clauses clause (a) or clause (b) of sub-section (1) of section 34 the notice is issued. The main notice to be issued in a case under section 34 is the notice under section 22 (2), and section 34 merely authorises the issue of such a notice.

The proceedings for re-assessment cover a period of 12 years : 1940-41 to 1951-52. Section 34 of the Income-tax Act has undergone some changes during that period, but the basic scheme of the section remained substantially the same. Power to re-assess income under section 34 (1) as amended by Act VII of 1939 could be exercised if "definite information" had "come into" the possession of the Income-tax Officer, and in consequence of such information it was discovered that income chargeable to tax had escaped assessment. By the Income-tax and Business Profits Tax (Amendment) Act XLVIII of 1948, section 34 (1), was recast to read as follows :

"(1) If—

(a) the Income-tax Officer has reason to believe that by reason of the omission or failure on the part of an assessee to make a return of his income under section 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gains chargeable to income-tax have escaped assessment for that year, or have been under-assessed, or assessed at too low a rate, * * * or

(b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that income, profits or gains chargeable to income-tax have escaped assessment for any year, or have been under-assessed, or assessed at too low a rate, * * * he may in cases falling under clause (a) at any time and in cases falling under clause (b) at any time within four years of the end of that year, serve on the assessee, * * * a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22 and may proceed to assess or re-assess such income, profits or gains * * *

An *Explanation* was also added which states :

"*Explanation*.—Production before the Income-tax Officer of account books or other evidence from which material facts could with due diligence have been discovered by the Income-tax Officer will not necessarily amount to disclosure within the meaning of this section."

Since on the matter canvassed in these appeals there is no material change in the section, we will only refer to the section as amended by Act XLVIII of 1948.

This Court in *Calcutta Discount Company Ltd. v. Income-tax Officer, Companies District I, and another*², observed that before the Income-tax Officer may issue a notice under section 34 (1)(a) of the Indian Income-tax Act, two conditions precedent must co-exist ; the Income-tax Officer must have reason to believe (1) that income, profits or gains had been under-assessed, and (2) that such under-assessment was due to non-disclosure of material facts by the assessee. The Court further held that where the Income-tax Officer has *prima facie* reasonable grounds for believing that there has been a non-disclosure of a primary material fact, that by itself gives him jurisdiction to issue a notice under section 34 of the Act, and the adequacy or otherwise of the grounds of such belief is not open to investigation by the Court.

1. (1956) 30 I.T.R. 535 : A.I.R. 1956 Cal. 197. (1961) 2 S.C.R. 241 : A.I.R. 1961 S.C. 372.
2. (1961) 41 I.T.R. 191 : (1963) 1 S.C.J. 741:

In a recent judgment of this Court in *S. Narayanappa and others v. The Commissioner of Income-tax, Bangalore*¹, Ramaswami, J., speaking for the Court observed :

"* * * the legal position is that if there are in fact some reasonable grounds for the Income-tax Officer to believe that there had been any non-disclosure as regards any fact, which could have a material bearing on the question of under-assessment that would be sufficient to give jurisdiction to the Income-tax Officer to issue the notice under section 34. Whether these grounds are adequate or not is not matter for the Court to investigate. In other words, the sufficiency of the grounds which induced the Income-tax Officer to act is not a justiciable issue. It is of course open for the assessee to contend that the Income-tax Officer did not hold the belief that there had been such non-disclosure. In other words, the existence of the belief can be challenged by the assessee but not the sufficiency of the reasons for the belief. Again the expression 'reason to believe' in section 34 of the Income-tax Act does not mean a purely subjective satisfaction on the part of the Income-tax Officer. The belief must be held in good faith : it cannot be merely a pretence. To put it differently it is open to the Court to examine the question whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief and are not extraneous or irrelevant to the purpose of the section. To this limited extent, the action of the Income-tax Officer in starting proceedings under section 34 of the Act is open to challenge in a Court of law.

It is clear from the affidavits filed in the Court of First Instance that the Income-tax Officer had received information relying upon which he had reason to believe that the assessee had not disclosed fully and truly all material facts necessary for the assessment and in consequence of non-disclosure of that information, income chargeable to tax had escaped assessment. In his affidavit, the Income-tax Officer stated :

"A scrutiny of the money-lending 'statements' filed by the assessee for the years ended 31st March, 1950 and 31st March, 1951 revealed that there were large investments made by the assessee in his money-lending business in those two years. The assessee did not file balance-sheets for the said two years, or for the earlier assessment years and consequently it was not clear from the statements filed by him, how he could make heavy investments in money-lending business in those two years."

The Income-tax Officer also stated that in the year of account 1949-50 the total investments in money-lending business had increased by Rs. 1,33,000 and in the following year by Rs. 49,000 and the plea of the assessee that growth in the investments of the assessee in those years was mainly due to "the cash balance" held by the manager out of his share received on partition between him and his brothers, and cash gifts from his father-in-law which were till then kept uninvested even in the money-lending business, was not supported by any evidence, that the assessee had suppressed the account books for the periods prior to 1st April, 1949, and that the assessee had not produced the deed of partition relied upon. According to the Income-tax Officer, the net wealth of the family on 1st April, 1937, inclusive of investments in the money-lending business was less than Rs. 50,000 and the investments made by the assessee in money-lending business were approximately of the order of Rs. 21,000, that the assessments made on the family from 1937-38 till 1948-49 showed that the assessee's aggregate income for those years was Rs. 30,000, that taking into account the manager's professional income and the agricultural income of the assessee, the aggregate could not exceed Rs. one lakh, and that possession of large wealth on 1st April, 1949, which was not explained justified him in inferring that there was escapement of assessment of huge income or in any event it had resulted in under-assessment on account of the failure of the assessee in not disclosing the material facts fully and truly for the assessment years 1940-41 to 1949-50.

The averments made by the Income-tax Officer in his affidavit which have been accepted by the Court of First Instance, *prima facie*, establish that the Income-tax Officer had reason to believe that by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, income chargeable to income-tax has escaped assessment.

It was urged on behalf of the assessee that year after year account books and statements of account were produced by the assessee before the Income-tax Officer, and the

Income-tax Officer had computed the taxable income on the materials furnished no case for exercising the power of the Income-tax Officer under section 34 was made out, since power to re-assess may not be exercised merely because on the same evidence the Income-tax Officer or his successor entertains a different opinion. In our view there is no force in this contention. From the affidavit of the Income-tax Officer it clearly appears that there had been considerable increase since 1938 in the investments in the money-lending transactions of the assessee and in the wealth of the assessee. The Income-tax Officer was not seeking to re-assess the income on a mere change of opinion. The increase in the wealth discovered was wholly disproportionate to the known sources of income of the assessee. That was *prima facie* evidence on which the reason to believe that the assessee had omitted to disclose fully and truly all material facts and that in consequence of such non-disclosure income had escaped assessment. The Income-tax Officer has said that no attempt was made by the assessee to furnish some reasonable proof of the source of the additional wealth; the partition deed was not produced; the books of account prior to 1948-49 were withheld on the plea that all the books were lost; no evidence was tendered to show that the father-in-law of the manager was possessed of sufficient means to give and did give any large cash amounts to him; and there was also no explanation why a large amount exceeding a lakh of rupees was not invested in the money-lending or other business.

The Income-tax Officer had therefore *prima facie* reason to believe that information material to the assessment had been withheld, and that on account of withholding of that information income liable to tax had escaped assessment. From the mere production of the books of account it cannot be inferred that there had been full disclosure of the material facts necessary for the purpose of assessment. The terms of the *Explanation* are too plain to permit an argument being reasonably advanced, that the duty of the assessee to disclose fully and truly all material facts is discharged when he produces the books of account or other evidence which has a material bearing on the assessment. It is clearly implicit in the terms of sections 23 and 34 of the Income-tax Act that the assessee is under a duty to disclose fully and truly material facts necessary for the assessment of the year, and that the duty is not discharged merely by the production of the books of accounts or other evidence. It is the duty of the assessee to bring to the notice of the Income-tax Officer particular items in the books of account or portions of documents which are relevant. Even if it be assumed that from the books produced, the Income-tax Officer, if he had been circumspect, could have found out the truth, the Income-tax Officer may not on that account be precluded from exercising the power to assess income which had escaped assessment.

It was urged that since the High Court in appeal did not decide whether any primary facts on which the determination of the issue of reasonable belief in non-disclosure of material facts necessary for the assessment of the previous year and escapement of tax in consequence thereof depended were not disclosed, the judgment of the High Court should be set aside. The learned Trial Judge has dealt with in detail the affidavits of both the assessee and the Income-tax Officer and has come to the conclusion that there was *prima facie* evidence of non-disclosure fully and truly of all material facts necessary for the assessment and on the materials placed before the Income-tax Officer he had reason to believe that as a consequence of that non-disclosure income had escaped assessment. The High Court in appeal after referring to the judgment in *Calcutta Discount Company's case*¹, observed :

"* * without the enquiry being held by the concerned Income-tax Officer it is not possible, on the material on record, to decide whether or not the assessee omitted to or failed to disclose fully and truly all material facts necessary for his assessment for the respective years."

The High Court has pointed out that no final decision about failure to disclose fully and truly all material facts bearing on the assessment of income and consequent escapement of income from assessment and tax could be recorded in the

1. (1963) 1 S.C.J. 741 : (1961) 2 S.C.R. 241 : (1961) 41 I.T.R. 191 : A.I.R. 1961 S.C. 372.

proceedings before them. It certainly was not within the province of the High Court to finally determine that question. The High Court was only concerned to decide whether the conditions which invested the Income-tax Officer with power to re-open the assessment did exist, and there is nothing in the judgment of the High Court which indicates that they disagreed with the view of the Trial Court that the conditions did exist.

These appeals therefore fail and are dismissed with costs. There will be one hearing fee.

T.K.K.

Appeals dismissed.

THE SUPREME COURT OF INDIA:

PRESENT :— J.C. SHAH, V. RAMASWAMI AND V. BHARGAVA, JJ.

S. Narayanappa and others

... *Appellants**

v.

Commissioner of Income-tax, Bangalore

... *Respondent.*

Income-tax Act, (XI of 1922), section 34—Back assessment—Income-tax Officer—Jurisdiction—Conditions precedent—Reasonable belief of under-assessment—Reasonable belief on the basis of omission or failure of assessee to file return or to disclose fully and truly material facts—Existence of the belief—Open to challenge in civil Court—Sufficiency of the reasons for the belief—Not justiciable—Reasons for the belief, if have a rational connection and relevant bearing to the formation of the belief—justiciable—Recording reasons for initiation of back assessment proceedings and obtaining sanction of the Commissioner—Administrative and not quasi-judicial—No duty to communicate reasons to assessee.

For the assessment year 1951-52, as the assessee did not file any return in response to the notices issued, the Officer completed the assessment on the available materials on the total income of Rs.36,068. Subsequently in proceedings for the assessment year 1955-56, the Officer found from the wealth-tax assessment that the assessee had made investments to the tune of Rs. 39,000 during the previous year relevant to the assessment year 1951-52, that items of house property acquired long before the relevant accounting year had been suppressed. The Officer initiated back assessment proceedings and assessed the assessee on a total income of Rs. 89,001, and the same was upheld by the Department, the Tribunal in further appeals and by the High Court in Reference. The assessee appealed.

Held, that the two conditions precedent to be satisfied before the Officer acquires jurisdiction to issue notice of back assessment under section 34 are, that the Officer must have reason to believe that the income had been under-assessed, and that he must have reason to believe that such under-assessment had occurred by reason of either (1) omission or failure on the part of an assessee to make a return of his income under section 22, or (2) omission or failure on the part of the assessee to disclose fully and truly all the material facts necessary for his assessment for that year.

If there are in fact some reasonable grounds for the Officer to believe that there had been non-disclosure as regards any fact which could have a material bearing on the question of under-assessment that would be sufficient to give jurisdiction to the Officer to issue the notice under section 34. Whether these grounds are adequate or not is not a matter for the Court to investigate. In other words, the existence of the belief can be challenged by the assessee but not the sufficiency of the reasons for the belief.

It is open to the Court to examine the question whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief and are not extraneous or irrelevant to the purpose of the section. To this limited extent the action of the Officer in starting proceedings under section 34 of the Act is open to challenge in a Court of law.

The proceedings for recording the reasons for initiating back assessment proceedings and obtaining the sanction of the Commissioner are administrative in character and are not quasi-judicial. There is no requirement in any of the provisions of the Act or any section laying down as a condition for initiation of the proceedings that the reasons which induced the Commissioner to accord sanction to proceed under section 34 must also be communicated to the assessee.

Appeal by Special Leave from the Judgment and Order, dated the 24th July, 1963, of the Mysore High Court in I.T.R.C. No. 3 of 1963.

R. Gopalakrishnan, for Appellants.

S. V. Gupte, Solicitor-General of India (*N. D. Karkhanis* and *R. N. Sachithy*, Advocates, with him), for Respondent:

The Judgment of the Court was delivered by

Ramaswami, J.—The appellant was carrying on business in jewellery, copper-wire and money-lending. The books of accounts of the appellant were closed on the 30th June, every year. For the assessment year 1951-52 for which the previous year ended on 30th June, 1950, the appellant did not comply with the notice issued under section 22 (2) or section 22 (4) of the Income-tax Act. No return was filed by the appellant. The assessment was completed by the Income-tax Officer on such material as was available on the 23rd February, 1955, and the income was assessed at Rs. 36,068. Subsequently, while making assessment for the assessment year 1955-56, from the wealth statement it was found that the appellant had made investments for Rs. 39,000 during the previous year which ended on the 30th June, 1950, though in respect of that previous year the appellant's income was assessed only at Rs. 36,068. A scrutiny of the wealth statement and the bank account and the extensive nature of the business carried on by the appellant led the Income-tax Officer to entertain a belief that the income of the year 1951-52 had been under-assessed. He accordingly issued a notice under section 34 (1) and after examining the return made, he assessed the income of the appellant at Rs. 89,002 by his order dated the 31st March, 1960. The appellant filed an appeal against the assessment order to the Appellate Assistant Commissioner, but the appeal was dismissed. The appellant preferred a further appeal to the Income-tax Appellate Tribunal, Madras Bench. The appellant did not dispute the quantum of the assessment but only the jurisdiction of the Income-tax Appellate Tribunal, Madras Bench. The Appellate Tribunal by its order dated the 31st January, 1962, overruled the objection and dismissed the appeal. At the instance of the appellant, the Tribunal referred the following question of law for the opinion of the High Court :

“Whether the Income-tax Officer had jurisdiction to initiate proceedings for the assessment year 1951-52 under the provisions of section 34 (1) (a) of the Indian Income-tax Act of 1922.”

The High Court answered the question against the appellant holding that the Income-tax Officer had jurisdiction to initiate proceedings against the appellant under section 34 (1) (a) of the Act for the assessment year 1951-52. This appeal is brought by Special Leave against the judgment of the High Court dated the 24th July, 1963.

On behalf of the appellant Mr. Gopalakrishnan contended in the first place that the reasons which induced the Income-tax Officer to initiate the proceedings under section 34 were justiciable. It was submitted that those reasons should have been communicated by the Income-tax Officer to the assessee before the assessment was made. In this connection, the further argument of the appellant was that those reasons “must be sufficient for a prudent man to come to the conclusion that the income had escaped assessment. In our opinion, there is no substance in any one of these arguments. It is true that two conditions must be satisfied in order to confer jurisdiction on the Income-tax Officer to issue the notice under section 34 in respect of assessments beyond the period of four years, but within a period of eight years, from the end of the relevant year. The first condition is that the Income-tax Officer must have reason to believe that the income, profits or gains chargeable to income-tax had been under-assessed. The second condition is that he must have reason to believe that such under-assessment had occurred by reason of either (1) omission or failure on the part of an assessee to make a return of his income under section 22, or (ii) omission or failure on the part of the assessee to disclose fully and truly all the material facts necessary for his assessment for that year. Both these conditions are conditions precedent to be satisfied before the Income-tax Officer acquires jurisdiction to issue a notice under the section. But the legal position is that if there are in fact some reasonable grounds for the Income-tax Officer to believe that there

had been any non-disclosure as regards any fact, which could have a material bearing on the question of under-assessment that would be sufficient to give jurisdiction to the Income-tax Officer to issue the notice under section 34. Whether these grounds are adequate or not is not a matter for the Court to investigate. In other words, the sufficiency of the grounds which induced the Income-tax Officer to act is not a justiciable issue. It is of course open for the assessee to contend that the Income-tax Officer did not hold the belief that there had been such non-disclosure. In other words, the existence of the belief can be challenged by the assessee but not the sufficiency of the reasons for the belief. Again the expression "reason to believe" in section 34 of the Income-tax Act does not mean a purely subjective satisfaction on the part of the Income-tax Officer. The belief must be held in good faith; it cannot be merely a pretence. To put it differently it is open to the Court to examine the question whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief and are not extraneous or irrelevant to the purpose of the section. To this limited extent, the action of the Income-tax Officer in starting proceedings under section 34 of the Act is open to challenge in a Court of law (*See Calcutta Discount Co., Ltd. v. Income-tax Officer, Companies, District I, Calcutta and another*¹).

In the present case the High Court has pointed out that the Income-tax Officer when examining the relevant material in the proceedings for the assessment year 1955-56 found that the appellant had made investments to the extent of Rs. 39,000 in the account year under question when the income assessed was only Rs. 36,068. On further examination it was discovered that items of house property acquired long before the relevant accounting year had been suppressed. The High Court, therefore, held that the Income-tax Officer had reasonable grounds for thinking that there was non-disclosure on the part of the appellant and that there was under-assessment for the assessment year 1951-52.

It was also contended for the appellant that the Income-tax Officer should have communicated to him the reasons which led him to initiate the proceedings under section 34 of the Act. It was stated that a request to this effect was made by the appellant to the Income-tax Officer, but the Income-tax Officer declined to disclose the reasons. In our opinion, the argument of the appellant on this point is misconceived. The proceedings for assessment or re-assessment under section 34 (1) (a) of the Income-tax Act start with the issue of a notice and it is only after the service of the notice that the assessee, whose income is sought to be assessed or re-assessed becomes a party to those proceedings. The earlier stage of the proceeding for recording the reasons of the Income-tax Officer and for obtaining the sanction of the Commissioner are administrative in character and are not quasi-judicial. The scheme of section 34 of the Act is that, if the conditions of the main section are satisfied a notice has to be issued to the assessee containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22. But before issuing the notice, the proviso requires that the Officer should record his reasons for initiating action under section 34 and obtain the sanction of the Commissioner who must be satisfied that the action under section 34 was justified. There is no requirement in any of the provisions of the Act or any section laying down as a condition for the initiation of the proceedings that the reasons which induced the Commissioner to accord sanction to proceed under section 34 must also be communicated to the assessee. In *The Presidency Talkies Ltd. v. First Additional Income-tax Officer, City Circle II, Madras*², the Madras High Court has expressed a similar view and we consider that that view is correct. We accordingly reject the argument of the appellant on this aspect of the case.

Lastly, it was submitted by the appellant that the proceedings under section 34 were invalid because the Income-tax Officer did not entertain the belief that the under-assessment was made by reason of omission or failure on the part of assessee

1. (1963) 1 S.C.J. 741; (1961) 2 S.C.R. 241; 2. (1954) 25 I.T.R. 447; A.I.R. 1954 Mad 872.

to make a return under section 22 or to disclose fully and truly all material facts necessary for the first assessment. There is no substance in the argument. The Tribunal has found that there was direct connection or nexus between the assessee's omission or failure to make a return and the under-assessment made by the Income-tax Officer for the year 1951-52. The High Court has affirmed this finding and concluded that the proceedings under section 34 (1) (a) of the Act were not defective in law.

For these reasons we dismiss this appeal with costs.

V.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

PRESENT:—J. C. SHAH, V. RAMASWAMY AND V. BHARGAVA, JJ.

Associated Clothiers, Ltd.

*Appellant**

v.

Commissioner of Income-tax, Calcutta

Respondent

Income-tax Act (XI of 1922), section 10 (2) (vii), second proviso—Balancing charge—Assessee, company—Transfer of assets and liability to another company under an agreement—Discharge of liabilities of assessee, cash and shares of the company—Consideration for the transfer—Difference between original cost and written down value of house property on the date of transfer—Deemed profits—Taxability—Sale, if made in a commercial sense, criterion.

Income-tax Act (XI of 1922), section 66—Reference—High Court—No power to admit additional evidence.

P & Co., incorporated as a private limited company in 1939, changed its name in 1952 to *A & Co.* the assessee herein, and on the same day a company styled *P & Co.*, was incorporated. By a written agreement of the same date, *A & Co.* agreed to transfer all its assets with liabilities to *P & Co.* in consideration of allotment of shares of *P & Co.* cash and for taking over the liabilities of *A & Co.* One of the properties agreed to be transferred was a house valued at about two lakhs of rupees. No deed of conveyance was executed but *P & Co.* took possession of the house in July, 1952. The original cost of the building was Rs. 97,258 and the written down value after deducting depreciation allowed from time to time, was Rs. 57,011. For the assessment year 1952-53 the Officer brought to tax the difference between the original cost and the written down value on the date of transfer as deemed profit of the assessee, under section 10 (2) (vii), second proviso. The Tribunal held it was not liable to be so assessed on the ground no profit resulted to the assessee by the sale to itself. The High Court in reference held against the assessee on the view (without any evidence) that the assessee carried on the business even after the transfer of its assets. The assessee appealed,

Held that, the assessee sold the property for a stated consideration which was not shown to be nominal and since the consideration was in excess of the original cost of the property, the difference was profit within the meaning of the second proviso to section 10 (2) (vii) of the Act. The question to which attention must be directed is whether there was by the agreement a transaction of sale in commercial sense.

The High Court in reference under section 66 is bound to proceed on the findings recorded by the Tribunal; it has no power to admit on record additional evidence and to consider that additional evidence. The Court must accept the statement made by the Tribunal in the Statement of the Case, especially when no objection was raised thereto before the Tribunal or before the High Court on behalf of the assessee.

Held on facts : the High Court was in error in proceeding on the basis, for which there was no evidence, that the assessee after transferring its assets carried on the business.

The contention that the transaction was merely a nominal transaction and the property in the shares remained with the same company in which it was vested, was never raised before or decided by the Tribunal and would not arise out of the order of the Tribunal. The burden of proving that the consideration for sale of the property was less than what it purports to be under the agreement of sale lay upon the assessee and since no attempt was made to prove that fact, the question cannot be

raised for the first time in the Supreme Court. The contention that the transaction of sale was a mere attempt to readjust the business position of the assessee was also never raised before the Tribunal and does not arise out of the order of the Tribunal.

Appeal from the Judgment and Order dated the 5th February, 1963, of the Calcutta High Court in Income-tax Reference No. 3 of 1958.

S.S. Shukla, Advocate, for Appellant.

S.T. Desai, Senior Advocate (*A. N. Kirpal* and *R. N. Sachthey*, Advocates with him), for Respondent.

The Judgment of the Court was delivered by

Shah, J.—*M/s. Phelps and Company Ltd.* was registered as a private limited company on 30th September, 1939, to carry on the business of "Clothiers and Tailors." On 21st March, 1952, under an order made under section 11 (4) of the Indian Companies Act, 1913, the name of the company was altered to Messrs. Associated Clothiers Ltd. On the same day a company styled "Messrs. Phelps & Co. Ltd." was incorporated. By a written agreement also of the same date the appellant-company agreed to transfer its assets and liabilities to Messrs. Phelps and Co. Ltd., in consideration of allotment of shares of the value of Rs. 12,30,000 of Messrs. Phelps & Co. Ltd., and Rs. 23,291/10/5 payable in cash, and Messrs. Phelps & Co. Ltd., taking over liabilities of the appellant-company of the aggregate amount of Rs. 6,05,601-0-6. Under the terms of the agreement the appellant company purported to transfer seven items of property described in the Schedules annexed to the deed : one of the properties so agreed to be transferred was described in the Second Schedule—a building at Connaught Place, New Delhi, valued at Rs. 2,24,673. No deed of conveyance was executed in pursuance of the agreement. It is, however, common ground that on 1st July, 1952, Messrs. Phelps & Co., Ltd. took over possession of the properties agreed to be sold.

The original cost of the building described in the Second Schedule was Rs. 97,258 and the written down value of the building after deducting depreciation allowed from time to time in the records of the Income-tax Officer was Rs. 57,011. In the balance-sheet of the appellant-company dated 31st March, 1953, the building was valued at Rs. 2,24,673 the price for which it was agreed to be sold. In proceeding for assessment for the account year 1952-53 the Income-tax Officer, Companies District IV, Calcutta, brought to tax the difference between the original cost and the written down value of the building on the date of the transfer as deemed profit of the appellant-company under the second proviso to section 10 (2) (vii) of the Indian Income-tax Act, 1922. Before the Appellate Tribunal it was contended that the sale of assets to the appellant-company was "in substance to self" and on that account no profit had resulted to the company and the amount sought to be brought to tax was not liable to be included in the company's profit. The Tribunal relying upon the decision of the Bombay High Court in *Commissioner of Income-tax, Bombay City v. Sir Homi Mehta's Executors*¹ upheld that contention.

At the instance of the Commissioner of Income-tax, Calcutta, the following question was referred to the High Court of Calcutta :

"Whether on the facts and in the circumstances of the case the Tribunal was right in holding that the sum of Rupees forty thousand two hundred and forty-seven could not be deemed to be profits of the assessee-company under the second proviso to section 10 (2) (vii) of the Indian Income-tax Act ?"

The High Court answered the question in the negative. Against the order passed by the High Court, with certificate under section 66-A (2) of the Indian Income-tax Act, this appeal is preferred.

The High Court was of the view that the principle of the decisions in *Sir Homi Mehta's Executor's case*¹ and in *Rogers & Co. v. Commissioner of Income-tax, Bombay City II*,² did not apply to the facts of the present case, since at all material times there were in existence two corporations which were distinct and the transfer by one corporation of its assets to another cannot be deemed to be a transfer to self ; that the transaction by which the appellant-company transferred its assets to Messrs. Phelps & Co. Ltd. was a transaction of sale, and the doctrine of "lifting the veil of corporate personality" had application only to a limited class of cases, and the case of the appellants could not be brought within that class ; and since the two companies "continued to exist side by side" for many years after the appellant-company had transferred its assets to Messrs. Phelps & Co. Ltd., two different companies which carried on business simultaneously could not be regarded as one entity. In this appeal with certificate, the appellant-company contends that the High Court gravely erred in recording its opinion on the question submitted, relying on evidence which was never placed before the Income-tax Officer or the Tribunal. Counsel urged that the observations made by the High Court that Messrs. Phelps & Co. Ltd., and the appellant-company "continued to exist side by side as two separate limited companies" and carried on business simultaneously for more than ten years is borne out by no evidence on the record. This criticism has force. The High Court in a reference under section 66 (1) or (2) is bound to proceed on the findings recorded by the Income-tax Appellate Tribunal : it has no power to admit on record additional evidence, as the High Court did, and to consider that additional evidence which was not placed before the Tribunal. We must therefore proceed on the view that there is no evidence before the Tribunal and no finding of the Tribunal that after transferring its assets the appellant-company carried on business.

Counsel for the company also submitted that the Tribunal was in error in observing that the appellant-company had transferred all its assets and liabilities to the new company. But in the Statement of The Case which is based upon the judgment of the Tribunal, there is a clear recital that all the assets and liabilities of the appellant-company were transferred to Messrs. Phelps & Co., Ltd. Counsel asked us to ignore that statement in view of the recital made in the preamble clause of the agreement dated 21st March, 1952, in which it was recited that Messrs. Phelps & Co. were "desirous of acquiring a part of the undertaking and property of the vendor-company." But there is nothing in the recitals which indicates that any assets were retained by the appellant-company. The Tribunal in deciding the appeal before it observed :

"Associated Clothiers Ltd., were owners of a business having assets and liabilities. By sale to Phelps & Co. Ltd. they got the entire ownership by way of shares and the same assets and liabilities remained in the hands of Phelps & Co. Ltd."

This Court must accept the statement made by the Tribunal in the Statement of The Case, especially when no objection was raised thereto before the Tribunal or before the High Court on behalf of the appellant-company at any time.

On the question whether in determining the liability of an assessee to pay income-tax it is open to the Court to ignore the corporate personality of a company and to fix upon the ownership of the business as decisive, there has been some difference of opinion. In *Sir Homi Mehta's Executor's case*¹, the assessee and his sons had formed a private limited company and transferred to that company shares in several joint stock companies which the assessee held jointly with his sons at the market value of the shares at that time. The departmental authorities levied income-tax on the difference between the market price and the cost price of the shares. The High Court of Bombay held that the so-called sale of the shares to the company was not a business activity entered into with the object of earning profit ; that it was not really a sale but a procedure adopted for readjustment of their position as holders of the

1. (1955) 28 I.T.R. 928 : 58 Bom. L.R. 112 : L.R. 866 : (1953) 34 I.T.R. 336 : A.I.R. 1959 R. (156) Bom. 154 : A.I.R. 1956 Bom. 415. Bom. 150.

2. I.L.R. (1952) Bom. 1203 : (1955) 60 Bom.

shares ; and that the assessee did not make any profit or gain in a commercial sense by transferring the shares to the company and therefore the difference between the market price and cost price of the shares was not exigible to tax as profit of the business.

In *Rogers & Co's case*¹, the partners of a firm carrying on the business of manufacturing aerated waters formed themselves into a private limited company, the shares allotted to each of them in the company being in the same proportions as the shares they held in the firm. The assets of the firm were transferred to the company for a price exceeding the written down value, and the difference between the original cost of the assets and the written down value was brought to tax under section 10 (2) (vii) of the Income-tax Act. The High Court held that the transfer of the assets of the firm to the company was merely a readjustment made by the members to enable them to carry on their business as a company rather than as a firm and no profit in a commercial sense was made thereby, and therefore the transfer of the assets of the firm to the company was not a sale and the provisions of the second proviso to section 10 (2) (vii) did not apply.

Chagla, C.J., in delivering the judgment in *Sir Homi Mehta's Executors' case*² observed at page 932 :

"Whatever legal or technical form a transaction may take, the Court must try and determine what the real transaction was and not the form which the transaction took."

Again the learned Chief Justice in *Rogers & Company's case*¹ observed that in all transactions which come up for consideration in a taxing statute the Court has to look not at the legal form which the transaction has, but to the real nature of the transaction. Counsel for the Revenue contends that in ignoring the legal form and relying upon "the substance of the transaction" the High Court of Bombay has erred. He relies in support of his submission upon the following observations in the judgment of the Judicial Committee in *Bank of Chettinad Ltd. v. Commissioner of Income-tax, Madras*³ at page 526 :

"The Commissioner of Income-tax in his reference stated that 'in substance these loans represent money lent by the Pudukottai Bank to the Kanadukathan Bank but the transactions have been unnecessarily complicated by resorting to a series of entries which are as superfluous as they are confusing.

Their Lordships think it necessary once more to protest against the suggestion that in revenue cases 'the substance of the matter' may be regarded as distinguished from the strict legal position."

But the decision of the Court in *Sir Homi Mehta's Executors case*², was not founded only upon the ground that the real transaction was different from what it purported to be. The Court in the two cases opined that in determining whether a certain transaction resulted in profit, it must be found that the transaction resulted in real profit, profit which from the commercial point of view meant a gain to the person who entered into the transaction, and that by transferring the assets with the intention merely to readjust the business relation of the owners of a business or asset, no real profit was earned.

Counsel for the Revenue relied upon the decision of the Patna High Court in *Maharajadhiraj Sir Kameshwar Singh v. Commissioner of Income-tax, Bihar & Orissa*⁴. It was held in that case that the doctrine that no man can make a profit out of himself is not applicable to transactions between a person and a limited company, even though all the shares in the company are owned by that person, because from "a legal point of view a company is an entity entirely distinct from its shareholders". The Court observed at page 495 :

1. I.L.R. 1958 Bom. 1203 : (1958) 60 Bom. L.R. 866 : (1958) 34 I.T.R. 336 : A.I.R. 1959 Bom. 150.

2. (1955) 28 I.T.R. 928 : 58 Bom. L.R. 112 : I.L.R. (1956) Bom. 154 : A.I.R. 1956 Bom. 415

3. (1940) 2 M.L.J. 851 : (1940) 8 I.T.R. 522 : I.L.R. (1941) Mad. 89 : 43 Bom. L.R. 132 : L.R. 67 I.A. 394 : A.I.R. 1940 P.C. 183.

4. (1962) B.L.J.R. 915 : I.L.R. 42 Pat. 547 : (1963) 48 I.T.R. 483 : A.I.R. 1964 Pat. 231.

* * * * * * it is not possible, in the circumstances of this case, to ignore or disregard the mask of corporate entity or to analyse the economic realities behind the transaction of sale."

Therefore the assessee though he was the owner of all the shares in the company could not claim to be treated as if he were identical with the company in order to promote his own benefit or advantage. But in *Maharajadhiraj Sir Kameshwar Singh's case*¹; it seems to have been admitted that the price for which the buildings machinery and plant were transferred to the company was not a notional figure, and the price being in excess of the cost of buildings, machinery and plant, section 10 (2) (vii) proviso was attracted, and the difference between the written down value and original cost was held taxable.

It is unnecessary for the purpose of this case to express any final opinion on the question, whether in taxing cases it is open to the assessing authority to ignore the corporate personality of a company and to hold that the interest of the shareholders in the shares of a company and in the business of the company is identical, and transfer by the owners of a business to a company in which the shares are owned by the former owners of the business does not give rise to a sale in a commercial sense. The present is not a case in which persons carrying on business have floated a private limited company and have attempted to readjust their business position. Here is a case in which the assets of one company have been sold to another. The question to which attention must be directed is whether there was by the agreement a transaction of sale in a commercial sense.

In a recent judgment of this Court in *Chittoor Motor Transport Co. (P.), Ltd. v. Income-tax Officer, Chittoor*², it was held by this Court that where a private limited company transferred some of its assets to a partnership consisting of three shareholders who held the entire issue of shares of the company for a consideration, but the whole business was not transferred, there was in truth a sale within the meaning of the Sale of Goods Act and under section 10 (2) (vib) the rebate received by the private limited company would be liable to be forfeited. This Court declined to accept the argument that when the company transferred the vehicles belonging to it to the partnership, there was no commercial transaction. The Court observed at page 242 :

"If we look at the resolution dated 30th June, 1959, it is quite clear that it is a sale for consideration of a number of buses by the limited company to the partnership. It would be a sale under the Sale of Goods Act and it would be a sale in any other proper meaning which might be given to the word 'sale'. We are not concerned whether any profit resulted to the assessee but what we are concerned with is whether the assessee had sold or transferred these buses to the partnership. To us the answer seems to be plain that whether the transaction resulted in profit to the company or not, the transaction comes within the purview of the latter part of section 10 (2) (vib)."

Counsel for the company also submitted that the transaction was merely a nominal transaction and the property in the shares remained with the same company in which it was vested. This contention was never raised before or decided by the Tribunal, and it does not arise out of the order of the Tribunal.

It was then urged that there was no profit to the company since there was no evidence about the market value of the property transferred and in the absence of any evidence to show that the property was sold for a price exceeding the written down value, liability under section 10 (2) (vii) second proviso will not arise. But in the agreement the properties sold were allotted specific values and no attempt was made at any time before the Tribunal to prove that the values so allotted to the various properties were not true. Substantially the whole of the consideration paid by Messrs. Phelps & Co., Ltd. is in the form of shares to the appellant-company, but unless there is evidence that the market value of the shares was less than their face value, the claim made by the appellant-company must fail. The burden of proving that the consideration for sale of the property was less than what it purports to be under the agreement of sale lay upon the company and

1. (1962) B.L.J.R. 915 : I.L.R. 42 pat. 547 : (1966) 1 M.L.J. (S.C.) 39 : (1966) 1 An. W.R. (1963) 48 I.T.R. 483 : A.I.R. 1964 pat. 231. (S.C.) 39 : (1966) 59 I.T.R. 238 : A.I.R. 1966
2. (1966) 1 I.T.J. 91 : (1966) 1 S.C.J. 127 : S.C. 570.

since no attempt was made to prove that fact, the question cannot be raised for the first time in this Court.

It was also said that the transfer was a slump sale of the assets and there being no separate sale of the property described in the Second Schedule, the difference between the written down value and the cost price was not liable to be included as income in the process of assessment. Reliance in this behalf was placed upon the observations of the Judicial Committee of the Privy Council in *Doughty v. Commissioner of Taxes*¹. In that case two partners carrying on business as general merchants and drapers sold the entire assets and goodwill of the partnership business to a limited company in which they became the only shareholders. The nominal value of the shares being more than the sum to the credit of the capital account of the partnership in its last balance-sheet, a new balance-sheet was prepared showing a larger value for the stock-in-trade. The Commissioner of Taxes treated the increase in value so shown as a profit on the sale of the stock-in-trade, and assessed the appellant upon it for income-tax. The Judicial Committee held that the assessment was wrongly made since if the transaction was to be treated as a sale there was no separate sale of the stock, and no valuation of it as an item forming part of the aggregate sold. This Court has affirmed the principle in *Doughty's case*¹, in a recent judgment : *Commissioner of Income-tax v. Mugneeram Bangur & Company*².

That principle has however no application here. In the present case it is true that the entire assets of the appellant-company were sold to Messrs. Phelps & Co., Ltd. There was no separate sale of different items, but the consideration of each item of property sold was expressly mentioned in the agreement of sale. The contention that the transaction of sale was a mere attempt to readjust the business position of the transferor was never raised before the Tribunal and does not arise out of the order of the Tribunal.

We decide this appeal on the narrow ground that the appellant-company sold the property in the Second Schedule for a stated consideration which was not shown to be notional, and since the consideration was in excess of the original cost of the building, the difference was profit within the meaning of section 10 (2) (vii), second proviso.

The appeal therefore fails and is dismissed with costs.

V.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH AND V. BHARGAVA, JJ.

M/s. Jugal Kishore Baldeo Sahai

.. *Appellants**

v.

Commissioner of Income-tax, U.P., Lucknow

.. *Respondent.*

Income-tax Act (XI of 1922), section 10 (2) (xv)—Business expenditure—Hindu undivided family—Karta—Salary or remuneration paid to Karta to manage family business, under a valid agreement—Existence of minor coparceners—Agreement in the interests of the family and for the benefit of minor—Amount allowable as business expenditure.

The assessee, a Hindu undivided family, consisting of two brothers and their minor sons, was carrying on a joint family business. Under an agreement between the brothers, the elder brother who was the karta of the family, was paid a salary to look after the joint family business. The assessee claimed this salary paid to the karta as an expenditure allowable under section 10 (2) (xv) of the Act. The Department, the Tribunal and the High Court in reference, rejected the claim for such deduction as a business expenditure. The assessee appealed,

1. L.R. (1927) A.C. 327.

2. (1965) 2 I.T.J. 490 : (1965) 2 S.C.J. 592.

* C.As.Nos. 594 to 600 of 1965.

20th September, 1966.

Held, that the sum was allowable as a business expenditure under section 10 (2) (xv).

If a remuneration is paid to the karta of the family under a valid agreement which is *bona fide* and in the interest of, and expedient for the business of the family and the payment is genuine and not excessive, such remuneration must be held to be an expenditure laid out wholly and exclusively for the purpose of the business of the family and must be allowed as an expenditure under section 10(2)(xv) of the Act.

If all persons competent in a Hindu undivided family to enter into an agreement on its behalf consider it appropriate that the karta should be paid remuneration and enter into an agreement to pay remuneration to him, that should be held to be an expenditure incurred in the interest of the family, and consequently, an expenditure allowable under section 10 (2) (xv). The test of the validity of an agreement on behalf of a minor is that it should be for the benefit of the minor. If the agreement is held to be in the interest of the family, the agreement would not be invalidated when executed on behalf of the minors by the person authorised to act on their behalf simply because the minors happened to be represented by a person who receives some benefit under the agreement.

It is well established that any member of a Hindu undivided family including a karta can have a separate personal source of income if that income is earned independently of the Hindu undivided family assets or business. It is primarily on this basis that it has been held that a salary or remuneration paid to the junior member of the family for services rendered to the family business becomes his separate income and consequently a deductible expenditure under section 10 (2) (xv) when computing the income of the family. Similarly the remuneration paid to the karta would be a business expenditure deductible under section 10 (2) (xv) of the Act.

The remuneration paid, not for the purpose of looking after the business of the family, but for the business of the firm of which the karta was the partner would not be deductible expenditure under section 10 (2) (xv) from the income of the Hindu undivided family.

Appeals by Special Leave from the Judgment and Order, dated the 28th March, 1962, of the Allahabad High Court in I.T. Misc. Case No. 424 of 1959.

A. K. Sen, Senior Advocate (*T. A. Ramachandran*, Advocate, and *J. B. Dadachanji*, Advocate of *M/s. J. B. Dadachanji & Co.*, with him), for Appellants.

S. T. Desai, Senior Advocate (*Gopal Singh* and *R. N. Sachthey*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Bhargava, J.—These appeals by Special Leave are directed against the judgment of the Allahabad High Court returning an answer to the following question referred to it by the Income-tax Appellate Tribunal:

“Whether on the facts and circumstances of the case the salary paid or credited to a karta of the family for looking after the family's business was a permissible deduction under section 10 (2) (xv) in computing the income of the family business.”

The assessee was a Hindu undivided family carrying on a joint family business of commission agency in cloth under the name of Jugal Kishore Baldeo Sahai and was, in addition, deriving income from some property and from some partnership business in which the karta, Babu Ram, was a partner representing the interest of the Hindu undivided family. The family consisted of Babu Ram, his brother Gobardhandas, and their sons. In June, 1946, the karta, Babu Ram, wrote a letter to his brother Gobardhandas, who was the only other adult member of the family, stating that, since he was managing all the business, he ought to get a salary of Rs. 1,000 per month. Gobardhandas promptly agreed to this proposal and consequently in the account books of the family for the year in question a sum of Rs. 12,000 was debited in the expense account of the Hindu undivided family business, viz., of Jugal Kishore Baldeo Sahai and the same amount was credited in the name of Babu Ram as an individual. The first such credit was made in the account year relevant to the assessment year 1946-47 and similar credits continued to be made in subsequent accounting years up to the year relevant to the assessment year 1952-53. Thus, the debit against the Hindu family business at the rate of Rs. 12,000 per year and similar credit in the name of Babu Ram was made in the accounts for seven years. In each of these seven years the Hindu undivided family as the assessee claimed that

this sum of Rs. 12,000 every year should be deducted as an expenditure under section 10 (2) (xv) of the Income-tax Act. The Income-tax Officer rejected the claim and that order was upheld by the Appellate Assistant Commissioner as well as by the Tribunal. Thereupon, at the request of the assessee-appellant, the question reproduced by us was referred by the Tribunal for the opinion of the High Court. The High Court answered the question against the appellant and upheld the view of the Tribunal. Consequently, these appeals have been brought up before us.

The High Court has taken the view that under the Hindu Law, a karta is bound by reason of his being the karta to manage all the business of the family without being entitled to any remuneration for the service of management. It went on to comment that indeed, when under the law a karta represents the family, it would be anomalous to think of a karta as being an employee of himself or being entitled to remuneration for acting as such and receiving payment from his own-self. This view was expressed by the High Court on the basis of its opinion about the rights and duties of a karta of a Hindu undivided family under the Hindu Law and to arrive at this view, the Court relied on a comment in Gopalchandra Sarkar Sastri's Hindu Law, 1940 Edn., N. E. Raghavachariar's Hindu Law, 4th Edn. and Mayne's Hindu Law, 11th Edn. and in addition, on a decision of the Madras High Court in *Krishnasami Ayyangar v. Rajagopala Ayyangar*¹. It was on the basis of these comments in the books of Hindu Law that the Allahabad High Court held the view that Babu Ram, being the karta of the family, was not entitled to draw any remuneration for carrying on the business of the Hindu undivided family.

The decision of the Madras High Court and the views expressed by these commentators do not show that a karta of a Hindu undivided family is not entitled to charge for services rendered to the family business under any circumstances at all. The right to receive remuneration is negatived with some qualifications. Either it is stated that no remuneration is payable except under special arrangement, or a scope for payment is recognised by saying that the manager or karta is not "ordinarily" entitled to remuneration. The Madras High Court in the case of *Krishnasami Ayyangar v. Rajagopala Ayyangar*¹ held that "the managing coparcener was not entitled to special remuneration in the absence of a valid special agreement". We are unable to understand the meaning of the expression "valid special agreement." It is, of course, necessary that before a karta receives remuneration, it should be under a valid agreement. In judging what is a valid or proper agreement which would justify the payment of remuneration paid to a karta of the Hindu undivided family for managing the business of the family to be deductible as an expenditure under section 10 (2) (xv) of the Income-tax Act, the test, we think, which should be applied, is whether the agreement has been made by or on behalf of all the members of the Hindu undivided family and whether it was in the interest of the business of the family, so that it could be justified on grounds of commercial expediency. That is the test which has always to be applied when considering whether a particular expenditure claimed as a deduction under section 10 (2) (xv) of the Income-tax Act has been incurred wholly and exclusively for the purpose of the business.

This Court in *Jitmal Bhurani v. Commissioner of Income-tax, Bihar and Orissa*², has already held that "a Hindu undivided family can be allowed to deduct salary paid to a member of the family, if the payment is made as a matter of commercial or business expediency". Mr. S. T. Desai, learned Counsel appearing for the Department, tried to distinguish that case on the ground that in that case the salaries which were held to be deductible were paid to junior members of the family and not to the karta. The view expressed by this Court was in general terms and did not make any distinction between a junior member of the family or a karta. The principle was laid down by this Court without any such distinction even though the Court was then concerned with salaries which had been paid to junior members of the family.

1. (1894) 4 M.L.J. 212 : (1895) I.L.R. 18 Mad. 73.

2. (1962) 44 I.T.R. 887.

We do not consider that the decision given by this Court in that case, needs to be given a narrow interpretation so as to confine the rights of deducting the remuneration paid by a Hindu undivided family to junior members only. There seems to be no reason at all why if a karta is paid remuneration he should be in a position different from that of any junior member. It is true that a karta has a right to manage the property of the Hindu undivided family on behalf of all the coparceners but there is no obligation or duty on him to carry on a particular business of the family. It is well established that any member of a Hindu undivided family including a karta can have a separate personal source of income if that income is earned independently of the Hindu undivided family assets or business. It is primarily on this basis that it has been held that a salary or remuneration paid to the junior member of the family for services rendered to the family business becomes his separate income and consequently a deductible expenditure under section 10(2) (xv) of the Act when computing the income of the family. In similar circumstances, if a karta offers his services to the family instead of choosing an independent career to earn his separate income and receives remuneration from the family, there is no reason why the remuneration so paid to him cannot be treated as an expenditure for carrying on the business of the family and consequently expended wholly and exclusively for the purpose of the business and deductible under section 10 (2) (xv) of the Act.

As we have already indicated above, the general view expressed by the commentators on Hindu Law as well as in decided cases is that even the karta of a family can be paid remuneration for carrying on the family business, provided it is under some agreement. There seems to be no reason why, if all persons competent in a Hindu undivided family to enter into an agreement on its behalf consider it appropriate that the karta should be paid remuneration and enter into an agreement to pay remuneration to him, that remuneration should not be held to be an expenditure incurred in the interest of the family, and consequently, an expenditure deductible under section 10 (2) (xv) of the Act. In the present case, Babu Ram received remuneration when he and his brother, Gobardhandas, agreed that such remuneration should be payable. The other members of the Hindu undivided family were minor sons of Babu Ram himself or of Gobardhandas. Babu Ram and Gobardhandas, being the only two members of the family competent to act on behalf of the family including the minors, entered into this agreement, obviously because it was considered in the interest of the family that Babu Ram should receive this payment. We are not at all impressed by the argument urged on behalf of the Department that, since some of the coparceners were minors, no valid agreement at all on their behalf could have been entered into by Babu Ram or Gobardhandas so as to allow payment of remuneration to the karta, Babu Ram. The minor sons of Babu Ram could certainly be represented by himself and the minor sons of Gobardhandas could either be represented by him, being his sons, or, in the alternative, Babu Ram could represent them in the agreement as the karta of the family to which they belonged. It is true that under the agreement, some payment was to be made out of the income of the family to Babu Ram so as to become his separate property. But that circumstance would not, in our opinion, invalidate the agreement merely because Babu Ram represented some of the minors on whose behalf the agreement was made. If the agreement is held to be in the interest of the family, the agreement would not be invalidated when executed on behalf of the minors by the person authorised to act on their behalf simply because the minors happened to be represented by a person who receives some benefit under the agreement. The test of the validity of an agreement on behalf of a minor is that it should be for the benefit of the minor, and in this case, there is no finding that the agreement entered into on behalf of the Hindu undivided family including the minors by Babu Ram and Gobardhandas was in any way prejudicial to the interests of the minor members. On the other hand, the facts found show that some of the minors subsequently attained majority and none of them challenged the validity of this agreement on the ground that it had been executed during their minority and that it was against their interest. In fact, it was found that subsequently, when there was a partition in which even the sons of Babu Ram separated from him, the amount to the credit of Babu Ram in the accounts was

treated as his separate asset and was not included in the assets of the Hindu undivided family without any objection from any of the members of the family who were minors at the earlier stage when the agreement was entered into. Consequently, we are unable to hold that the agreement, by which Babu Ram was allowed this remuneration of Rs. 1,000 per mensem was in any way vitiated, and, as we have already held above, it was an agreement executed in the interest of the family.

In our view, if a remuneration is paid to the karta of the family under a valid agreement which is *bona fide* and in the interest of, and expedient for, the business of the family and the payment is genuine and not excessive, such remuneration must be held to be an expenditure laid out wholly and exclusively for the purpose of the business of the family and must be allowed as an expenditure under section 10 (2) (xv) of the Act.

In this connection, we may take notice of a decision in the Patna case, *Commissioner of Income-tax, Bihar and Orissa v. Jainarain Jagannath*¹, wherein also it was held that a member of a joint Hindu family might conceivably do business in his individual capacity and in that capacity might render services to the joint family trading firm in consideration of which the firm might pay him such remuneration as it would pay to an outsider. If such remuneration is not excessive and is reasonable and is not a device to escape income-tax, then it will be a legitimate deduction in computing the profits of the business. If, on the other hand, the amount paid is unreasonably high and disproportionate to the services rendered by him, then it may be treated as part of the profits of the firm distributed in a particular manner. In the present case, there is no indication of any finding that the payment to Babu Ram was at all high, or was not commensurate with the services rendered by him.

An alternative ground, on which Mr. Desai on behalf of the Department challenged this deduction under section 10 (2) (xv) was that the remuneration was being paid to Babu Ram not only to manage the Hindu undivided family business carried on under the name of Jugal Kishore Baldeo Sahai, but also for other businesses, including those of the partnership firms in which Babu Ram was a partner in his own name, though representing the Hindu undivided family. In support of this proposition, learned Counsel relied on the decision of the Calcutta High Court in *Jitmal Bhuramal v. Commissioner of Income-tax, Bihar and Orissa*², which judgment was affirmed by this Court as reported in *Jitmal Bhuramal v. Commissioner of Income-tax, Bihar and Orissa*². In that case, there was a finding of fact that two junior members of the Hindu undivided family, Gulzarilal and Madanlal, were employed in the partnership business in which the karta of the family was a partner and had rendered service to that business. This Court, while recognising the principle that "a Hindu undivided family is allowed to deduct salaries paid to members of the family, if the payment is made as a matter of commercial or business expediency," laid down the exception that the services rendered must be to the family. It was held that, since the services had been rendered not to the family, but to the partnership firm, the remuneration paid to those members was not a legitimate deduction under section 10 (2) (xv) from the income of the Hindu undivided family, and that it could be a valid deduction only when computing the income of the partnership business.

It is true that in the case before us the Statement of The Case mentions that the agreement for payment of remuneration to Babu Ram was to the effect that he was to get Rs. 1,000 per mensem for looking after the businesses of the Hindu undivided family. It is because of the use of the word "businesses" in the plural that learned Counsel urged that the remuneration given to Babu Ram was not merely for looking after the Hindu undivided family business, but also for rendering services to the partnership firms in which Babu Ram was a partner. We do not consider

1. (1945) 13 I.T.R. 410 : I.L.R. 24 Pat. 634 : (1946) P.W.N. 70 : A.I.R. 1946 Pat. 68. 2. (1959) 37 I.T.R. 528 : A.I.R. 1959 Patna 395.

that this interpretation of the agreement is correct. The agreement does not envisage any payment to Babu Ram for services rendered to the partnership firms. The language used was that Babu Ram should receive the remuneration for managing all the businesses of the Hindu undivided family, which can only mean that he was to manage the affairs of the Hindu undivided family firm and also to look after the interests of the Hindu undivided family in other businesses. Thus the remuneration was not intended to cover any services rendered by him to the partnership firms apart from whatever he was required to do in the capacity of looking after and managing the affairs of the Hindu undivided family. The principle laid down in the case of *Jitmal Bhurama v. Commissioner of Income-tax, Bihar and Orissa*¹, is, therefore, not applicable to the case before us.

The appeals are consequently allowed. The judgment of the High Court is set aside and the question referred by the Income-tax Appellate Tribunal is answered in the affirmative. The appellant will be entitled to its costs in this Court as well as in the High Court.

Appeals allowed.

V. S.

THE SUPREME COURT OF INDIA.

PRESENT:—J. C. SHAH, V. RAMASWAMI AND V. BHARGAVA, JJ.

S. Srinivasan, Erode

— Appellant*

v.

Commissioner of Income-tax, Madras

— Respondent.

Income-tax Act, (XI of 1922), section 16 (3) (a) (i) and (ii)—Firm—Assessee, his wife and stranger partners—Two minor sons of assessee also admitted to benefits of partnership—Interest on accumulated profits of wife and minor sons—Whether includible in the assessment of the assessee.

The appellant was a senior partner in a firm in which the two other partners were his wife and a stranger. In addition, two minor sons of the appellant were admitted to the benefits of the partnership. In one of the clauses of the partnership deed it was provided that "if the firm requires any sum for meeting the expenses for its management and if any of the partners has and is willing to give such amount, he may advance (such amount) as loan. He may receive interest for such sum at the rate of 12 annas per cent. per mensem". Up to the beginning of the previous year relevant to the assessment year 1957-58 the profits that were accumulating in the accounts to the credit of the wife and the two minor sons of the appellant were kept without any interest. With effect from the previous year in question, the partnership decided to allow interest at 9 per cent. per annum on these accumulated profits. The Income-tax Officer added the interest on accumulated profits of the wife and minor sons to the income of the appellant for purposes of assessment under section 16 (3) (a) (i) and (ii) of the Indian Income-tax Act, 1922. On appeal the Appellate Assistant Commissioner held in favour of the appellant. The Tribunal on further appeal, held that the amount of interest credited to the account of the minors in respect of capital provided by the grandfather and grandmother had to be excluded from the total income of the appellant while the interest earned on the accumulated profit was rightly included in the income of the appellant. On reference, the High Court answered the question against the appellant. On appeal to the Supreme Court,

Held, that the interest at least indirectly arose and accrued to the wife and the minor sons because of their capacity mentioned in section 16 (3) (a) (i) and (ii) and was therefore includible in the assessment of the appellant.

The cases where interest is earned on a deposit or a loan differ from a case where interest was earned on amounts of which the minors permitted the use by the firm, because they were their accumulated profits arising from the firm itself and because of their interest in the firm as persons admitted to the benefits of the partnership.

Appeal by Special Leave from the Judgment and Order dated the 27th day of August, 1962, of the High Court of Madras in T.C. No. 82 of 1960.

A.K. Sen. Senior Advocate (R. Gopalakrishnan, Advocate, with him), for Appellant.

S.T. Desai, Senior Advocate (A.N. Kirpal and R.N. Sachthey, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Bhargava, J.—The appellant is a senior partner in a firm in which the two other partners are his wife and a stranger. In addition, two minor sons of the appellant were admitted to the benefits of the partnership. Under the deed of agreement constituting the partnership, the shares in the profits of all the five persons were defined. There was also specification of the shares in which losses were to be shared by the three partners. There was a clause in the deed of partnership that “if the firm requires any sum for meeting the expenses for its management and if any of the partners has and is willing to give such amount, he may advance (such amount) as loan. He may receive interest for such sum at the rate of 12 annas per cent. per mensem.” The firm earned profits which were distributed in accordance with their shares between the three partners and the two minors who were admitted to the benefits of the partnership. The amounts of profit falling to the share of the wife of the appellant and his two minor sons were allowed to accumulate in the accounts of the partnership for a number of years. Up to the beginning of the previous year relevant to the assessment year 1957-58, the profits that were accumulating in the accounts to the credit of the wife and the two minor sons of the appellant were kept without any interest. With effect from the previous year in question, the partnership decided to allow interest at 9 per cent. per annum on these accumulated profits, so that, during this previous year, the amounts to the credit of these three persons increased on account of two additions in each case. There was addition of further profit falling to their share and there was added interest on the opening balance of the accumulated profits in the accounts of each one of these three persons. All these amounts added to the accounts during the previous year in respect of the share of profits as well as interest on accumulated profits were added to the income of the appellant for purposes of assessment under section 16 (3) (a) (i) and (ii) of the Income-tax Act. These additions were challenged by the appellant on two different grounds. The first ground was that the provisions of section 16(3) (a) (i) and (ii) were *ultra vires* as being beyond the legislative powers of Parliament. The second ground was that, even on the application of these provisions, at least the amount added to the income of the appellant in respect of the interest credited in the accounts of his wife and minor sons was not justified in law. Both these objections were overruled by the Income-tax Officer. On appeal, the Appellate Assistant Commissioner upheld the decision of the Income-tax Officer on the first point, but decided the second point in favour of the appellant and held that the interest earned by his wife and minor sons from the firm could not be included in the income of the appellant for purposes of charging it with income-tax. The Income-tax Appellate Tribunal, on further appeal, again upheld the decision on the first question, but, on the second question, partly rejected the claim of the appellant. The Tribunal held that the amount of interest credited to the account of the minors in respect of capital provided by their grandfather and grandmother had to be excluded from the total income of the assessee, while the interest earned on the accumulated profits was rightly included in the income of the appellant. Thereupon, at the request of the appellant, the following two questions were referred by the Tribunal for the opinion of the Madras High Court :

“(i) Whether the provisions of section 16 (3) (a) (i) and (ii) offend clauses (f) and (g) of Article 19 (1) of the Constitution of India ?

(ii) Whether interest credited by the aforesaid firm to the assessee's wife and minor children attributable to past profit accumulations only is includible in the assessment of the assessee under section 16 (3) (a) (i) and (ii) ?”

The High Court answered both the questions against the appellant, and consequently, he has come up to this Court by Special Leave.

So far as the first question is concerned, learned Counsel appearing for the appellant himself did not press it before us in view of the decision of this Court in *Balaji v. Income-tax Officer, Special Investigation Circle, Akola, and others*¹. That point was earlier decided by the Madras High Court in *B.N. Aminā Umma v. Income-tax Officer, Kozhikode*². It has been held by this Court in *Balaji's case*¹, that the provisions of section 16 (3) (a) (i) and (ii) did not impose any unreasonable restriction on the fundamental rights of the assessee under Article 19 (1) (f) and (g) of the Constitution and were consequently, valid. The first question has, therefore, been clearly answered correctly by the High Court against the appellant.

Learned Counsel appearing for the appellant mainly argued before us the second question and urged that though the profits earned from the partnership by the wife and the minor sons of the appellant were undoubtedly income arising to them directly from the partnership of the wife in the firm or the admission of the minors to the benefits of the partnership in the firm, the interest accruing on the accumulated profits should not be held to arise either directly or indirectly from the same source. The argument was that the accumulated profits belonging to the wife and the minor sons should be held to be in the nature of deposits made by them with the firm, or in the nature of loans advanced by them to the firm, and interest earned on such deposits or loans can have no relationship with the membership of the firm of the wife or the admission to the benefits of the partnership of the minor sons. It appears to us that these accumulated profits remaining in the hands of the firm cannot, on any principle, be equated with deposits made or loans advanced. The profits accumulated to the credit of the wife and the minor sons, because they did not draw their share of profits when distribution of profits took place, and allowed these profits to remain with the firm; but there is no suggestion at all that, at that stage, either the wife or the minor sons, or anyone on their behalf, purported to enter into an arrangement with the firm to keep these accumulated profits as deposits. Similarly, there was no such contract which could convert those accumulations into loans advanced to the firm by these persons. The facts and circumstances indicate that the wife and the minor sons had earned these profits because of their membership of the firm or because of their admission to the benefits of the firm, and having earned these profits in that capacity, they allowed the use of their profits to the firm without any specific arrangement as would naturally have been entered into if these funds had belonged to a stranger. They let the firm use funds of theirs, because they had interest in the profits of the firm. The facts also show that the use of these moneys was allowed to the firm without asking for any interest, and it was only at a later stage that the three partners of the firm decided to give interest on these amounts. When the decision was taken to give interest, the nature of the funds did not change. They did not get converted into deposits or loans. They still remained accumulations belonging to a partner or persons admitted to the benefits of the partnership and allowed to be used by the firm. The interest also appears to have been allowed by the firm simply because these funds belonged either to a partner or to the minors who had been admitted to the benefits of the partnership. It is thus clear that the interest at least indirectly arose and accrued to the wife and the minor sons because of their capacity mentioned in section 16 (3) (a) (i) and (ii) of the Income-tax Act.

In this connection, learned Counsel for the appellant relied on a decision of the Bombay High Court in *Bhogilal Laherchand v. Commissioner of Income-tax, Bombay City*³. It was held in that case that interest earned by minors on deposits maintained in the firm could not be held to be a benefit which the minors received from their admission to the partnership of the firm. The case is inapplicable, because, as we have

1. (1961) 1 S.C.J. 376; (1961) 43 I.T.R. 393; 1120.

(1962) 2 S.C.R. 983; A.I.R. 1962 S.C. 123.

2. (1955) 2 M.L.J. 393; I.L.R. (1955) Mad. 702; (1954) 26 I.T.R. 137; A.I.R. 1954 Mad.

3. I.L.R. (1954) Bom. 1093; 56 Bom.L.R. 718; (1954) 25 I.T.J. 523; A.I.R. 1955 Bom. 16.

indicated above, in this case the interest arising to the wife and the minor sons of the appellant was not the result of any deposits made by them with the firm.

*Chouthunal Kajriwal v. Commissioner of Income-tax, Assam*¹, and *Akula Venkatasubbiah v. Commissioner of Income-tax*², were cases where interest was paid to the minors on the capital provided by them for the business of the partnership. In those cases, it was held that the interest on the capital contributed by the minor sons was benefit arising from the admission of the minors to the benefits of the partnership, and consequently, that interest had to be included in the total income of the father in his assessment. These two cases are of no assistance, because the nature of the amount on which interest has accrued to the wife and the minor sons of the appellant is different and is not on capital advanced by them or on their behalf.

Reference was also made by learned Counsel to a decision of the Allahabad High Court in *L. Ram Narain Garg v. Commissioner of Income-tax, U.P.*³, in which case also it was held that interest paid to a minor son admitted to the benefits of a partnership on his capital investment is income derived directly or indirectly by him from the admission and is includible in the income of the father under section 16 (3) (a) (ii) of the Income-tax Act. It was further held that it cannot be stated as a matter of law that interest paid by a partnership to a minor admitted to its benefits can never be said to be connected even indirectly with the fact of his admission. It is connected with the fact if the interest paid is on capital investment by the minor or on a loan advanced to the partnership by the minor and the partnership deed forbids the raising of a loan from any person other than a partner or a person admitted to its benefits. It is not connected with the fact if the interest is paid on a deposit made, or loan advanced by the minor, and the partnership was free to accept a deposit or a loan from any person even if not connected with it. The principle enunciated by the Allahabad High Court does not envisage all circumstances in which interest may be earned by a minor on his moneys with the firm. The cases where interest is earned on a deposit or a loan differ from a case of the type before us where interest was earned on amounts of which the minors permitted the use by the firm, because they were their accumulated profits arising from the firm itself and because of their interest in the firm as persons admitted to the benefits of the partnership. In the circumstances, the answer returned by the High Court to the second question was also correct. The appeal fails and is dismissed with costs.

T.K.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :— J. C. SHAH, V. RAMASWAMI AND V. BHARGAVA, JJ.

Commissioner of Income-tax, West Bengal, Calcutta

... *Appellant**

v.

Juggilal Kamalapat

... *Respondent.*

Income-tax Act (XI of 1922), section 26-A—Registration of firm—Some partners, creating trust and becoming trustees—Relinquishment of their rights in the assets of firm in favour of trust—Deed of relinquishment not registered—New firm constituted with the trust (represented by trustees) as a partner—Whether legally constituted and entitled to registration.

A firm had four partners, the three Singhanian brothers and one J. S., all having equal shares. The three Singhanian brothers created a trust of which they became the first trustees and executed a deed of relinquishment relinquishing their rights and claims to all the properties and assets of the firm in favour of J. S. and of themselves in the capacity of the three first trustees of the trust. The deed of relinquishment was not registered. A new firm was constituted with two partners, one being J. S. and the other being the trust represented by the three trustees. The Income-tax Officer

1. (1961) 41 I.T.R. 570.

2. (1963) 47 I.T.R. 458.

* G.A. No. 127 of 1966.

refused registration of the new firm under section 26-A of the Income-tax Act, 1922. On appeal the Appellate Assistant Commissioner upheld the order of the Income-tax Officer. The Tribunal refused registration on the main ground that the relinquishment deed being an unregistered document could not legally transfer rights and title to the immovables owned by the firm in favour of the trust and that the transfer of the immovables being thus legally ineffective and they being not separable from the other business assets, the entire business of the firm was not legally transferred in favour of the trust. The High Court, on reference, held that there was no legal flaw in the constitution of the new firm and there was no impediment to its registration under section 26-A. On appeal to the Supreme Court,

Held, that the partnership between the trust and *J.S.*, was valid in law and therefore was entitled to registration.

The deed of relinquishment was in respect of the individual interest of the three Singhanias brothers in the assets of the partnership firm in favour of the trust and consequently did not require registration even though the assets of the partnership firm included immovable property and was valid without registration. As a result of this deed all the assets of the partnership vested in the new partners of the firm.

In the alternative even if the deed of relinquishment required registration that would not lead to the conclusion that the partnership seeking registration was not valid and had not come into existence in law. The deed of relinquishment could, at best, be held to be invalid in so far as it affected the immovable properties included in the assets of the firm; but to the extent that it purported to transfer movable assets of the firm, the document would remain valid. The deed could clearly be divided into two separate parts, one relating to immovable properties and the other to movable assets; and the part of the deed dealing with movable assets could not be held invalid for want of registration.

A deed of relinquishment is in the nature of a deed of gift where the various properties dealt with are always separable and the invalidity of the deed of gift in respect of one item cannot affect its validity in respect of another.

A deed of relinquishment or a deed of gift differs from a deed of partition in which it is not possible to hold that the partition is valid in respect of some properties and not in respect of others because rights of persons being partitioned are adjusted with reference to the properties subject to partition as a whole.

Appeal from the Judgment and Order dated the 11th December, 1962 of the Calcutta High Court in Income-tax Reference No. 47 of 1962.

S. T. Desai, Senior Advocate (*A. N. Kirpal* and *R. N. Sachithy*, Advocates, with him), for Appellant.

A. K. Sen, Senior Advocate (*B. P. Maheshwar*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Bhargava, J.—This appeal arises out of proceedings for registration of the firm, Juggilal Kamalapat, Calcutta, under section 26-A of the Income-tax Act (hereinafter referred to as "the Act") for the assessment year 1943-44. Prior to this assessment year, the three Singhanias brothers, Sir Padampat Singhanias, Kamalapat Singhanias and Lakshmipat Singhanias, were carrying on a hosiery business in the name of Messrs. Juggilal Kamalapat with Head Office at Kanpur and a branch at Calcutta. On 29th November, 1939, these three brothers executed a deed of partnership, by which one Jhabbarmal Saraf was taken in as a partner, and under this deed all the four partners had equal shares. On 27th October, 1941, the three brothers executed a trust deed known as the Kamla Town Trust, the principal object of which was the welfare of the employees of Juggilal Kamalapat Cotton Spinning and Weaving Mills Ltd. Under this deed, the three brothers became the first trustees. On 2nd December, 1942, a deed of relinquishment was executed by the three brothers, relinquishing their rights and claims to all the properties and assets of the firm, Juggilal Kamalapat, in favour of Jhabbarmal Saraf and of themselves in the capacity of the three first trustees of the Kamla Town Trust. This relinquishment deed purported to recognise an earlier oral relinquishment which was stated as having been operative

with effect from 26th March, 1942. On 1st December, 1942, a partnership deed was executed between Jhabbarmal Saraf and the three trustees, by which they purported to constitute a partnership firm taking effect from 27th March, 1942, the two partners in the firm being Jhabbarmal Saraf and the Kamla Town Trust represented by these three trustees. The shares of the two partners in this partnership were : Kamla Town Trust—0-12-0 and Jhabbarmal Saraf—0-4-0. The firm, Juggilal Kamalapat, which had been carrying on the business of hosiery owned both movable and immovable properties at Belur near Calcutta. The immovable properties consisted of lands and buildings constructed for the use of the factory for manufacturing hosiery, and they were shown in their balance-sheet as properties belonging to the firm. The firm had also been showing expenses incurred for maintaining or making additions or alterations to these buildings in their accounts and had been claiming depreciation in respect of them. It was in these circumstances that the new partnership purporting to consist of the Kamla Town Trust and Jhabbarmal Saraf, applied for registration under section 26-A of the Act for the assessment year 1943-44.

The Income-tax Officer rejected this claim and, in doing so, also took notice of the fact that a sum of Rs. 50,000 had been introduced into this partnership firm by the Trust. The reason given by the Income-tax Officer for not accepting the registration need not be mentioned here, because that reason was not accepted by the Tribunal and was not urged before the High Court or before this Court on behalf of the Commissioner. On appeal, the Appellate Assistant Commissioner upheld the order of the Income-tax Officer for reasons given by him which were different from those given by the Income-tax Officer. Those reasons are again immaterial, because those reasons were not accepted by the Tribunal or the High Court and have not been relied upon before us.

The Income-tax Appellate Tribunal upheld the order rejecting the application for registration under section 26-A on the main ground that the relinquishment deed dated 2nd December, 1942, being an unregistered document, could not legally transfer rights and title to the immovables owned by the firm in favour of the Kamla Town Trust, and that the transfer of the immovable properties being thus legally ineffective and they being not separable from the other business assets, the entire business of the firm was not legally transferred in favour of the Kamla Town Trust. Two other reasons were also given that the constitution of the new firm was not notified to any of the banks with which the old firm was dealing, and the new partnership was not got registered with the Registrar of Firms till May, 1946. On these facts, at the request of the respondent-firm, Juggilal Kamalapat, the following question was referred by the Tribunal for opinion to the Calcutta High Court :—

“Whether on the above facts and in the circumstances of this case, the partnership, as evidenced by the deed of 1st December, 1942, legally came into existence and as such should be registered?”

When this reference came up before the High Court on two different occasions, the High Court sent back the case for submission of Further Statements of The Case to the Tribunal, because the High Court felt that facts necessary to hold whether the respondent-firm claiming registration was a genuine firm or not, had not been properly found by the Tribunal in its appellate order. On the first occasion, when submitting the Supplementary Statement of The Case, the Tribunal purported to submit two different questions in lieu of the question which had been already submitted for opinion to the High Court. The two questions thus newly suggested were :—

“(1) Whether in the facts and circumstances of this case, can the non-registration of relinquishment deed invalidate the transfer of the business assets to the new partnership? and

(2) Can the registration application be rejected merely on the ground that the business assets were not legally transferred to the new partnership?”

The High Court disposed of the reference by giving the following answer :—

“Regard being had to the admissions made on behalf of the Department, the facts and circumstances mentioned in paragraph 6 of the Statement of Case dated 13th March, 1952 do not show that there was any legal flaw in the constitution of the partnership firm as evidenced by the deed of 1st December, 1942. Upon such evidence, it must be concluded that it did come into existence and there is no impediment to its registration under section 26-A of the Income-tax Act. It is made

clear that the question itself postulates the facts and circumstances and therefore, the conclusion is based upon them. In view of the facts in this case, there will be no order as to costs."

This appeal has been brought up by the Commissioner of Income-tax against this answer returned by the High Court on certificate under section 66-A (2) of the Act.

It appears from the judgment delivered by the High Court that when the reference came up before it, an argument was raised on behalf of the Commissioner of Income-tax that the Tribunal had recorded a finding of fact that the firm seeking registration, consisting of the Kamla Town Trust and Jhabbarmal Saraf, was not a genuine firm and that this should be the answer returned by the High Court to the Tribunal. It was in view of this point raised before the High Court that the High Court considered it necessary to remand the case twice to the Tribunal to ask for Supplementary Statements of The Case under section 66 (4) of the Act. At the final hearing, however, the High Court held that it could not be accepted that the Tribunal had, as a question of fact, recorded the finding that this firm seeking registration was not genuine and had never come into existence, and thereupon, proceeded to deal with the question referred as a question of law so as to determine whether the firm had come into existence as a legally valid firm.

In this appeal before us, again, it was urged by Mr. S. T. Desai on behalf of the Commissioner that the High Court was wrong in holding that it was not bound to return the answer to the Tribunal that the partnership seeking registration was not genuine in fact. In our opinion, the question sought to be raised on behalf of the Commissioner should not have been allowed to be raised by the High Court even at the earliest stage, and that it was the error committed by the High Court in entertaining this question that has resulted in unnecessary proceedings and consequent delay. When the case first came up before the High Court, the question that was referred in the Statement of The Case was, as we have mentioned above, whether the partnership legally came into existence and, as such, should be registered. The existence of a firm could be challenged on two alternative grounds. One was that in fact, on the evidence, it could not be held that such a firm had at all been constituted and had come into existence. The other was that even though it purported to come into existence as a fact, it could not claim to be a valid partnership because of some legal defect, or, in other words, whether its existence was valid in law. On the face of it, the question that was referred to the High Court for opinion was the second question and not the first one. The first question, in fact, could not have been referred to the High Court at all for opinion, because that would be a pure question of fact on which the decision of the Tribunal would be final and no reference to the High Court would lie under section 66. A reference to the High Court lies only on a question of law. The High Court, when requested to answer the question referred in the first Statement of The Case, should, therefore, have confined itself to the legal aspect of the existence of the partnership and should not have entered at all into the question whether the partnership had come into existence in fact or not. The Tribunal which had passed the appellate order in these proceedings consisted of two Members, and the first Statement of The Case was submitted by those very Members. It is clear that they themselves, when making the reference to the High Court, were of the view that they had not anywhere recorded a finding that the firm had not come into existence in fact, because, if they had come to such a finding, no question of law could possibly have been referred by them to the High Court. The existence in law of the firm, which does not exist in fact, could not possibly be found by the High Court on the question referred. Consequently, we must reject the submission made on behalf of the Commissioner that, in this case, the High Court should have gone into the question of existence of the respondent-firm as a question of fact; and in this appeal also, we must proceed on the basis that the respondent-firm did in fact come into existence, and that all that the High Court was called upon to decide was whether it also came into existence in law.

It appears to us that, in this case, the submissions that were made on behalf of the Commissioner before the High Court and which have been made before us

have ignored the effect of the important relevant documents and have unnecessarily placed too much reliance on the deed of relinquishment. The Tribunal found that the Kamla Town Trust had been constituted of which the three Singhania Brothers were the trustees. The Tribunal also found that a deed of partnership was executed so as to constitute the firm Juggilal Kamalapat, consisting of two partners the Kamla Town Trust, represented by the three trustees, and Jhabbarmal Saraf. Their shares in the profits and losses were also specified in the deed of partnership. There was the further finding by the Income-tax Officer that the Kamla Town Trust, which entered into the partnership actually introduced a sum of Rs. 50,000 as its capital in this partnership firm. On these facts by themselves, it should have been held that a valid partnership had come into existence.

So far as the deed of relinquishment is concerned, learned Counsel appearing on behalf of the Commissioner has not been able to show to us any provision of law, or any decision of a Court laying down that a deed of relinquishment executed by partners of a firm in respect of their share and interest in a firm required registration, in case the firm owned immovable properties. In this connection, learned Counsel for the respondent-firm brought to our notice a recent decision of this Court in *Addanki Narayanappa and another v. Bhaskara Krishnappa (dead) and thereafter his heirs, and others*¹, where the question that came up for consideration was whether the interest of a partner in partnership assets comprising of movable as well as immovable property should be treated as movable or immovable property for the purposes of section 17 (1) of the Registration Act, 1908. The Court upheld the view of the Full Bench of the Andhra Pradesh High Court in *Addanki Narayanappa and another v. Bhaskara Krishnappa and others*². Mudholkar, J., speaking for this Court held :

"It seems to us that looking to the scheme of the Indian Act, no other view can reasonably be taken. The whole concept of partnership is to embark upon a joint venture and for that purpose to bring in as capital money or even property including immovable property. Once that is done, whatever is brought in would cease to be the exclusive property of the person who brought it in. It would be the trading asset of the partnership in which all the partners would have interest in proportion to their share in the joint venture of the business of partnership. The person who brought it in would, therefore not be able to claim or exercise any exclusive right over any property which he has brought in, much less over any other partnership property. He would not be able to exercise his right even to the extent of his share in the business of partnership. As already stated, his right during the subsistence of the partnership is to get his share of profits from time to time as may be agreed upon among the partners and after the dissolution of the partnership or with his retirement from the partnership of the value of his share in the net partnership assets as on the date of dissolution or retirement after a deduction of liabilities and prior charges."

On this basis, the ultimate decision was that a deed, evidencing the transfer of an interest of a partner in partnership assets, does not require registration even though the partnership assets are comprised of movable as well as immovable property.

A Full Bench of the Lahore High Court in *Ajudhia Pershad Ram Pershad v. Shyam Sundar and others*³, held that the interest in a partnership of a partner is to be regarded as movable property when it is sought to be dealt with under Order 21, rule 49, Civil Procedure Code, notwithstanding that at the time when it is charged or sold the partnership assets include immovable property.

The deed of relinquishment, in this case, was in respect of the individual interest of the three Singhania Brothers in the assets of the partnership firm in favour of the Kamla Town Trust, and consequently, did not require registration, even though the assets of the partnership firm included immovable property, and was valid without registration. As a result of this deed, all the assets of the partnership vested in the new partners of the firm.

1. (1966) 2 S.C.J. 490 : (1966) 2 M.L.J. (S.C.) 377 : (1959) 1 An.W.R. 300 : A.I.R. 1959 60 : (1966) 2 An. W.R. (S.C.) 60 : A.I.R. 1966 A.P. 380 (F.B.).

3. I.L.R. (1947) Lah. 417 : A.I.R. 1947 Lah. 13 (F.B.).

2. I.L.R. (1959) A.P. 387 : (1959) An. L.T.

In the alternative, we think that, even if it had been accepted that this deed of relinquishment required registration, that would not lead to the conclusion that the partnership seeking registration was not valid and had not come into existence in law. The deed of relinquishment could, at best, be held to be invalid in so far as it affected the immovable properties included in the assets of the firm; but to the extent that it purported to transfer movable assets of the firm, the document would remain valid. The deed could clearly be divided into two separate parts, one relating to immovable properties and the other to movable assets and the part of the deed dealing with movable assets could not be held invalid for want of registration. A deed of relinquishment is in the nature of a deed of gift, where the various properties dealt with are always separable and the invalidity of the deed of gift in respect of one item cannot affect its validity in respect of another. This view was expressed by the Madras High Court in *Perumal Annmal v. Perumal Naicker and another*¹. A deed of relinquishment or a deed of gift, differs from a deed of partition in which it is not possible to hold that the partition is valid in respect of some properties and not in respect of others, because rights of persons being partitioned are adjusted with reference to the properties subject to partition as a whole. In the case before us, therefore, the deed of relinquishment was valid at least in respect of movable properties and the partnership seeking registration, thus, became owner of all the movable assets of the partnership in addition to having contributed a sum of Rs. 50,000 as capital investment in it. The Kamla Town Trust and Jhabbar Saraf constituted the partnership, under a deed of partnership, which was properly executed; and in these circumstances the partnership that came into existence was clearly valid in law. There is, therefore, no force in this appeal and it is dismissed with costs.

T. K. K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

PRESENT :—K. SUBBA RAO, *Chief Justice* AND J. M. SHELAT, (J.)

Union of India

.. Appellant*

v.

Metal Corporation of India, Ltd. and another

... Respondents.

Company—Acquisition of the undertaking by Government—Principles to determine compensation, prescribed by law—Actual cost to company of unused plant, machinery, etc.—Cost less depreciation as 'written down value' of used machinery—If 'just equivalent'—Judicial securitily.

Constitution of India, 1950 (as amended by Fourth Amendment Act, 1965), Article 31 (2):

Metal Corporation of India (Acquisition of Undertaking) Act XLIV of 1965, section 10 and Schedule, Paragraph II (b).

Under Ordinance (VI of 1965) promulgated by the Central Government for the acquisition of the undertaking of the Metal Corporation of India, a private company, the Government took possession, control and management of the Corporation on or about 23rd October, 1965. The Corporation filed a petition under Article 226 in the High Court for the State of Punjab No. 631-D of 1965 challenging the validity of the Ordinance. Meanwhile the Parliament passed the Metal Corporation of India (Acquisition of Undertaking) Act (XLIV of 1965) on the same terms as contained in the Ordinance. The Corporation and its Managing Director filed another writ Petition in the said High Court for a declaration that the Act was *ultra vires* the Constitution. The High Court held that the Ordinance and the Act contravened Article 31 of the Constitution and so constitutionally void. Hence the instant appeal.

The question of validity centres on the provisions of paragraph II (b) of the Schedule to the Act (i.e.) whether the principles of valuation of (i) the unused plant, machinery or other equipment at the actual cost and (ii) those used and in good condition at the 'written down value' are void.

Held, under Article 31 (2) of the Constitution, no property shall be compulsorily acquired except under a law providing for payment of compensation therefor; the law should either fix the amount of compensation or specify the principles on which and the manner in which the compensation is to

1. (1921) 40 M.L.J. 25 : (1921) I.L.R. 44 Mad. 196 : A.I.R. 1921 Mad. 137.

*C.A.No. 1222 of 1966.

5th September, 1966.

be determined. The second limb of the provision says that no such law shall be called in question in any Court on the ground of inadequacy of the compensation.

The law providing for compensation, to justify itself, has to provide for payment of 'just equivalent', at or about the time of acquisition, to the property acquired or lay down principles which lead to that result. If the principles laid down are relevant to the fixation of compensation and are not arbitrary, the adequacy of the resultant product cannot be questioned in a Court of law.

The validity of the principles, judged by the above tests, falls within the judicial scrutiny. It is manifest, in the instant case, that the two principles laid down in clause (b) of paragraph II of the Schedule to the Act, namely, (i) compensation equated to the cost price in case of unused plant and machinery in good condition and (ii) 'written down value' as known to Income-tax law, is the value of used machinery are irrelevant to the fixation of their value as on the date of acquisition. Therefore the impugned Act has not provided for 'compensation' within the meaning of Article 31 (2) of the Constitution and it is void.

The entire undertaking is acquired as a unit. The constitutional invalidity of clause (b) of para. II of the Schedule affects the totality of compensation, as provided for in section 10 of the Act, payable in respect of the entire undertaking and in that context the clauses of para. II are not severable; the Act as a whole is unconstitutional and the High Court is right in its conclusion.

Appeal from the Judgment and Order dated the 14th March, 1966 of the Punjab High Court (Circuit Bench) at Delhi in Civil Writ No. 832-D of 1965.

S. V. Gupte, Solicitor-General of India and *N. S. Bindra*, Senior Advocate (*R. H. Dhebar* and *B. R. G. K. Achar*, Advocates, with them), for Appellant.

M. C. Setalvad and *B. C. Dutt*, Senior Advocates (*Santosh Chatterjee* and *B. Parthasarathy*, Advocates, and *O. C. Mathur* and *Ravinder Naram*, Advocates of *M/s. J. B. Dadachanji & Co.*, with them), for Respondent No. 1.

B. C. Dutt, Senior Advocate (*Santosh Chatterjee* and *Anand Prakash*, Advocates, and *O. C. Mathur* and *Ravinder Naram*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him), for Respondent No. 2.

The Judgment of the Court was delivered by

Subba Rao, C.J.—This appeal by certificate raises the question of the constitutional validity of the Metal Corporation of India (Acquisition of Undertaking) Act (XLIV of 1965), hereinafter called the Act.

The relevant facts lie in a small compass. The 1st respondent, the Metal Corporation of India, Limited, hereinafter called the Corporation, was a limited company constituted under the Indian Companies Act, having for its objects, *inter alia*, the development of zinc and lead mines at Zawar in the State of Rajasthan and the construction of a zinc smelter and other connected works for producing electrolytic zinc and by-products. The Government was satisfied that it was necessary to acquire the said Corporation in public interest and on 22nd October, 1965, the President of India promulgated an Ordinance (VI of 1965) providing for the acquisition of the Corporation by the Central Government. Pursuant to the said Ordinance, on or about 23rd October, 1965, the Central Government took over the possession, control and administration of the said Corporation. The Corporation, the 1st respondent and its Managing Director, the 2nd respondent, filed a Writ Petition under Article 226 of the Constitution in the High Court of Judicature for the State of Punjab, Circuit Bench at New Delhi, being Petition No. 631-D of 1965, challenging the validity of the said Ordinance. In the meantime, the Parliament passed the Act on the same terms as contained in Ordinance No. VI of 1965; it received the assent of the President of India on 12th December, 1965. The respondents filed another writ petition in the said High Court, being Writ Petition No. 832-D of 1965, for a declaration that the Act was *ultra vires* the Constitution. The said High Court held that the Ordinance and the Act contravened the relevant provisions of Article 31 of the Constitution and, therefore, were constitutionally void. The present appeal is preferred against the said judgment of the High Court.

It will be convenient at this stage to read the relevant provisions of the Act. The Preamble and the relevant provisions of the Act read :

"Preamble.—

An Act to provide for the acquisition of the undertaking of the Metal Corporation of India, Limited for the purpose of enabling the Central Government in the public interest to exploit, to the fullest extent possible, zinc and lead deposits in and around the Zawar area in the State of Rajasthan and to utilise those minerals in such manner as to subserve the common good.

*Section 3.—*On the commencement of this Act, the undertaking of the company shall, by virtue of this Act, be transferred to, and vest in, the Central Government:

Section 10.—(1) The Central Government shall pay compensation to the company for the acquisition of the undertaking of the company and such compensation shall be determined in accordance with the principles specified in the Schedule and in the manner hereinafter set out, that is to say,—

(2) Notwithstanding that separate valuations are calculated under the principles specified in the Schedule in respect of the several matters referred to therein, the amount of compensation to be given shall be deemed to be a single compensation to be given for the undertaking as a whole.

(3) *

THE SCHEDULE.

Principles for determining compensation for acquisition of the undertaking.

*Paragraph I.—*The compensation to be paid by the Central Government to the company in respect of the acquisition of the undertaking thereof shall be an amount equal to the sum total of the value of the properties and assets of the company on the date of commencement of this Act calculated in accordance with the provisions of paragraph II less the sum total of the liabilities and obligations of the company as on the said date calculated in accordance with the provisions of paragraph III.

Paragraph II.—(a) The market value of any land or buildings ;

(b) the actual cost incurred by the company in acquiring any plant, machinery or other equipment which has not been worked or used and is in good condition and the written down value determined in accordance with the provisions of the Income-tax Act, 1961 (XLIII of 1961), of any other plant, machinery or equipment ;

(c) the market value of any shares, securities or other investments held by the company ;

(d) the total amount of the premiums paid by the company in respect of all leasehold properties reduced in the case of each such premium by an amount which bears to such premium the same proportion as the expired term of the lease in respect of which such premium shall have been paid bears to the total term of the lease ;

(e) the amount of debts due to the company, whether secured or unsecured, to the extent to which they are reasonably considered to be recoverable ;

(f) the amount of cash held by the company, whether in deposit with a bank or otherwise ;

(g) the value of all tangible assets and properties other than those falling within any of the preceding clauses.

*Paragraph III.—*The total amount of liabilities and obligations incurred by the company in connection with the formation, management and administration of the undertaking and subsisting immediately before the commencement of this Act."

The gist of the said provisions may be given thus. The Act was made to acquire in public interest the undertaking of the Corporation. On the commencement of the Act, the undertaking was transferred and vested in the Central Government. Under section 10 of the Act, the Government shall pay compensation to the undertaking as a whole ; but, in the absence of an agreement between the Government and the Corporation, the compensation payable to the Corporation has to be ascertained under the principles specified in the Schedule in respect of several matters referred to therein. Paragraph I of the Schedule lays down the manner in which the compensation to be paid to the Corporation for the acquisition of the undertaking is to be ascertained. The said compensation shall be an amount equal to the sum total of the value of the properties and assets of the Corporation on the date of the commencement of the Act calculated in accordance with the provisions of paragraph II less the liabilities on the said date calculated in accordance with the provisions of paragraph III of the Schedule. Broadly, the said paragraph lays down the principles for ascertaining the value of lands, buildings, machinery and equipment, amounts due to the undertaking and other tangible assets and properties. The different clauses of

the paragraph adopt different principles for valuation. But what is important for the present purpose is the principle embodied in clause (b) of paragraph II. It is in two parts : the first provides for the valuation of plant, machinery or other equipment which has not been worked or used and is in good condition, and the second provides for the valuation of any other plant, machinery or equipment. The former has to be valued at the actual cost incurred by the Corporation in acquiring the same and the latter at the written down value determined in accordance with the provisions of the Indian Income-tax Act, 1961.

The High Court held, on a construction of the said provisions, that the principle contained in clause (b) of paragraph II of the Schedule to the Act in respect of machinery, etc. :

“cannot be called relevant to the determination of ‘just equivalent’, as it takes no notice of the notorious fact that prices have been steadily rising during the past several years, particularly of imported machinery and plant.”

It also held,

“that depreciation rule does not even pretend to determine the actual depreciation in a particular case and it is obvious that such depreciation has no real relationship with the actual value of any machinery at any particular point of time.”

On that reasoning, it came to the conclusion, having regard to the decision of this Court in *Vajravelu v. Special Deputy Collector*¹, that the said provision in respect of machinery did not lay down a principle for fixing compensation, i.e., a just equivalent to the machinery acquired.

The reasoning of the High Court was attacked by the learned Additional Solicitor-General on the ground that it did not appreciate the true scope of the said decision of this Court and that, in any view, it went wrong in applying the principle of the said decision to the provisions of the Act. He contended that the Act laid down the broad principle that compensation shall be paid for the entire undertaking as a unit, but provided different modes for the ascertainment of the value of different parts thereof in such a way that the deficiency in the valuation of one part was offset by the liberal valuation of the other part. In that view, he contended, the Act embodied a principle relevant to the ascertainment of compensation for the undertaking acquired and, therefore, the product worked out under the said principle pertained only to the realm of adequacy which was beyond the ken of judicial review. He added that compensation in Article 31 of the Constitution meant that compensation which was regarded as just in the context of public acquisitions and that that test was satisfied in the present case.

Mr. M. C. Setalvad, learned Counsel for the respondents, contended that though under the Act compensation was to be given to the undertaking as one unit, the Act laid down principles for arriving at the valuation of the parts to arrive at the valuation of the whole and that, therefore, every such principle should stand the test laid down by this Court. So judged, the argument proceeded, both the principles laid down in clause (b) of paragraph II of the Schedule had no nexus to the ascertainment of compensation for the machinery acquired, for in the case of unused machinery, its cost price was the guide and in the case of used machinery its written down value was the criterion and that both the methods were arbitrary.

We find it difficult to appreciate the arguments of the learned Solicitor-General. It is true that under section 10 of the Act the Central Government shall pay compensation for the acquisition of the undertaking to the Corporation and the said compensation arrived at in the manner prescribed in the Schedule to the Act shall be deemed to be a single compensation to be given to the undertaking as a whole. But it will be noticed that though a single compensation for the undertaking is given the said compensation shall be determined in accordance with the principles specified in the Schedule. Under the Schedule, the compensation for the entire undertaking shall be the amount equal to the sum total of the value of the properties and assets of the Corporation calculated in accordance with the provisions of paragraph II of

1. (1964) 2 S.C.J. 703 : (1964) 2 M.L.J. (1965) 1 S.C.R. 614 : A.I.R. 1965 S.C. 1017.
(S.C.) 173 : (1964) 2 An. W.R. (S.C.) 173 :

the Schedule. Under the said paragraph II, different principles are laid down for ascertaining the value of different parts of the undertaking. If all the said principles laid down in paragraph II of the Schedule do not provide for the just equivalent of all the parts of the undertaking mentioned therein, the sum total also cannot obviously be a just equivalent of the undertaking. So too, if some of them do not provide for a just equivalent and others do so, the sum total cannot equally be a just equivalent to the undertaking. In the case of the undertaking in question, the machinery is the most valuable part of the undertaking. Apropos the unused machinery in good condition, how can the price for which the said machinery was purchased years ago possibly represent its price at the time of its acquisition? A simple illustration will disclose the irrelevance of the principle. Suppose in 1950 a machinery was purchased for Rs. 100 and, for some reasons, the same has not been used in the working of the undertaking but has been maintained in good condition. That machinery has not become obsolescent and still can be used effectively. If purchased in open market it will cost the owner Rs. 1,000. A compensation of Rs. 100 for that machinery cannot be said to be a just equivalent of it. It is common knowledge that there has been an upward spiral in prices of the machinery in recent years. The cost price of a machinery purchased about ten years ago is a consideration not relevant for fixing compensation for its acquisition in 1965. The principle must be such as to enable the ascertainment of its price at or about the time of its acquisition. Nor the doctrine of written down value accepted in the Income-tax law can afford any guide for ascertaining the compensation for the used machinery acquired under the Act. Under the general scheme of the Income-tax Act, the income is to be charged regardless of the diminution in the value of the capital. But the rigour of this hard principle is mitigated by the Act granting allowances in respect of depreciation in the value of certain assets such as machinery, buildings, plant, furniture, etc. These allowances are worked out on a notional basis for giving relief to the income-tax assessee. This artificial rule of depreciation evolved for income-tax purposes has no relation to the value of the said assets. To illustrate : a machinery was purchased in the year 1950 for Rs. 1,000. The aggregate of all the depreciation allowances made year after year for ten years may exhaust the sum of Rs. 1,000 with the result, after the tenth year, the assessee will not be entitled to any depreciation. From this it cannot be said that after the tenth year the machinery has no value. Indeed, a machinery purchased for Rs. 1,000 in 1950, because of subsequent rise in prices, may be sold in 1965 for Rs. 10,000. But the application of the principle laid down in clause (b) of paragraph II of the Schedule to the Act in regard to used machinery gives the owner no compensation at all. Yet, the Government takes the machinery worth Rs. 10,000 gratis. This illustration exposes the extreme arbitrariness of the principle. It is, therefore, manifest that the two principles of valuation embodied in clause (b) of paragraph II of the Schedule to the Act are not relevant to the fixing of compensation for the machinery at the time of its acquisition under the Act. The argument of the learned Additional Solicitor-General that the working out of all the principles in respect of different parts of the undertaking would result in a product which would fairly represent, in the context of public acquisitions, the "just equivalent" to the undertaking acquired is purely based on a surmise for, it is not shown that the working out of any one or more of the principles would give a higher compensation to some parts of the undertaking so that the excess paid under one head would offset the deficiency under another head. Nor can the doctrine of inherent worth of a machinery has any relevance in the matter of giving compensation for its acquisition at a particular point of time, for the simple reason that the worth of an article depends upon the market conditions obtaining at the time of its acquisition. It is impossible to predicate, irrespective of such conditions, that a particular machinery has a fixed value for all times.

Four decisions of this Court laid down the principles applicable to the present case. Indeed, but for the said decisions, we would have posted this case before a Constitution Bench of five Judges. But, as this appeal involves only the application of the construction put upon Article 31 of the Constitution by this Court in the said

decisions, we did not resort to that course. The first of them is *The State of West Bengal v. Mrs. Bela Banerjee*¹. There, the validity of the West Bengal Land Development and Planning Act, 1948 was under scrutiny. Section 8 thereof provided that compensation to be awarded for compulsory acquisition to owners of land was not to exceed the market value as on 31st December, 1946. This Court held that the said Act was *ultra vires* the Constitution and void under Article 31 (2) thereof. In that context, Patanjali Sastri, C.J., observed :

“Turning now to the provisions relating to compensation under the impugned Act, it will be seen that the latter part of the proviso to section 8 limits the amount of compensation so as not to exceed the market value of the land on 31st December, 1946, no matter when the land is acquired. Considering that the impugned Act is a permanent enactment and lands may be acquired under it many years after it came into force, the fixing of the market value on 31st December, 1946, as the ceiling on compensation, without reference to the value of the land at the time of the acquisition is arbitrary and cannot be regarded as due compliance in letter and spirit with the requirement of Article 31 (2).”

The above decision was followed by this Court in *State of Madras v. D. Namasivaya Mudaliar*². There the respondents were owners of certain lands which were to be compulsorily acquired under Madras Lignite (Acquisition of Land) Act, 1953. The Act came into force on 20th August, 1953, before Article 31, of the Constitution was amended by the Constitution (Fourth Amendment) Act, 1955. By the said Act compensation for the acquisition of lignite-bearing lands under the Land Acquisition Act was to be assessed on the market value of the land prevailing on 28th August, 1947, and not on the date on which the notification was issued under section 4 (1) of the Land Acquisition Act. It also provided that in awarding compensation, the value of non-agricultural improvements commenced since 28th April, 1947, would not be taken into consideration. This Court held that the said Act was bad, because it contravened Article 31 (2) of the Constitution, as it stood before the Constitution (Fourth Amendment) Act, 1955. This Court, speaking through Shah, J., observed :

“Assuming that in appropriate cases, fixation of a date anterior to the publication of the notification under section 4 (1) for ascertainment of market value of the land to be acquired, may not always be regarded as a violation of the constitutional guarantee, in the absence of evidence that compensation assessed on the basis of market value on such anterior date, awards to the expropriated owner a just monetary value of his property at the date on which his interest is extinguished, the provisions of the Act arbitrarily fixing compensation based on the market value at a date many years before the notification under section 4 (1) was issued, cannot be regarded as valid.”

Then the learned Judge proceeded to state :

“To deny to the owner of the land compensation at rates which justly indemnify him for his loss by awarding him compensation at rates prevailing ten years before the date on which the notification under section 4 (1) was issued amounts in the circumstances to a flagrant infringement of the fundamental right of the owner of the land under Article 31 (2) as it stood when the Act was enacted.”

These two decisions turned upon the construction of Article 31 (2) of the Constitution before the Constitution (Fourth Amendment) Act, 1955. These cases laid down two propositions : (1) “Compensation” under Article 31 (2) of the Constitution means a “just equivalent” of what the owner has been deprived ; and (2) the value of land at an anterior date is presumed to be no compensation within the meaning of the said Article. After the Constitution (Fourth Amendment) Act, 1955, this Court had to construe in two decisions the amended provision of Article 31 (2) *vis-a-vis* the expression “compensation” found therein. The first decision is that in *Vajravelu v. Special Deputy Collector*³. There this Court observed at pages 625-626 :

“A scrutiny of the amended Article discloses that it accepted the meaning of the expressions “compensation” and “principles” as defined by this Court in *Mrs. Bela Banerjee's case*¹.”

And it held that, if the compensation is illusory or if the principles prescribed are irrelevant to the value of the property at or about the time of its acquisition, it can

1. (1954) 1 M.L.J. 162 : (1954) S.C.J. 95 : 6 S.C.R. 936, 945 : A.I.R. 1965 S.C. 190.
(1954) S.C.R. 558, 564 : A.I.R. 1954 S.C. 170. 3. (1964) 2 S.C.J. 703 : (1964) 2 M.L.J. (S.C.)
2. (1965) 2 An. W.R. (S.C.) 82 : (1965) 2 173 : (1964) 2 An. W.R. (S.C.) 173 : (1965) 1
M.L.J. (S.C.) 82 : (1965) 2 S.C.J. 563 : (1964) S.C.R. 614 : A.I.R. 1965 S.C. 1017.

Section 10 is an integral part of a scheme for providing for payment of bonus at rates which do not widely fluctuate from year to year and that is sought to be achieved by restricting the quantum of bonus payable to the maximum rate of 20 per cent. and for carrying forward the excess remaining after paying bonus at that rate to be "set on" in the succeeding year, up to and inclusive of the fourth accounting year for being utilised for the purpose of payment of bonus. Similarly where for an accounting year there is no available surplus or the allocable surplus in respect of that year falls short of the amount of minimum bonus payable, then such minimum amount or the deficiency shall be carried forward for being "set off" in the succeeding accounting year, up to and inclusive of the fourth accounting year. The object of the Act being to maintain peace and harmony between labour and capital by allowing the employees to share the prosperity of the establishment, Parliament has provided that the bonus in a given year shall not exceed 1/5th and shall not be less than 1/25th of the total earning of each individual employee. This scheme of prescribing maximum and minimum rates of bonus together with the scheme of "set off" and "set on" as provided in section 15 not only secures the right of labour to share in the prosperity of the establishment, but also ensures a reasonable degree of uniformity.

Equal protection of the laws is denied if in achieving a certain object, persons, objects or transactions similarly circumstanced are differently treated by law and the principle underlying that different treatment has no rational relation to the object sought to be achieved by the law. Examined in the light of the object of the Act and the scheme of "set off" and "set on"; the provision for payment of minimum bonus cannot be said to be discriminatory between different establishments which are unable on the profits of the accounting year to pay bonus merely because a uniform standard of minimum rate of bonus is applied to them.

Section 10 undoubtedly places in the same class establishments which have made inadequate profits not justifying payment of bonus, establishments which have suffered marginal loss and establishments which have suffered heavy loss. The classification so made is not unintelligible. Plea of invalidity of section 10 on the ground that it infringes Article 14 of the Constitution of India must therefore fail.

Nothing need be said about the plea that section 10 contravenes Article 19 (1) (g) of the Constitution for by the declaration of emergency by the President under Article 352, the protection of Article 19 against any legislative measure stands suspended.

Nor has the plea that section 10 infringes Article 31 (1) of the Constitution any force.

By majority (with *M. Hidayatullah* and *V. Ramaswami, JJ.*, dissenting) :

Section 37 of the Payment of Bonus Act which authorises the Central Government to provide by order for removal of doubts or difficulties in giving effect to the provisions of the Act delegates legislative power which is not permissible. By providing that the order made must not be inconsistent with the purposes of the Act, section 37 is not saved from the vice of delegation of legislative authority. Sub-section (2) of section 37 which purports to make the order of the Central Government in such cases final accentuates the vice in sub-section (1), since by enacting that provision the Government is made the sole judge whether difficulty or doubt had arisen in giving effect to the provisions of the Act, whether it is necessary or expedient to remove the doubt or difficulty and whether the provision enacted is not inconsistent with the purposes of the Act. Section 37 must therefore be struck down as invalid.

Section 33 of the Payment of Bonus Act is patently discriminatory and is therefore void as infringing Article 14 of the Constitution of India.

Section 33 seeks to apply the provisions of the Act to a pending dispute, if the dispute relates to payment of bonus for any accounting year not being an accounting year earlier than the accounting year ending on any day in 1962, and is pending on 29th May, 1965 before the Government or other authority under the Industrial Disputes Act or any other corresponding law. The provisions of the Act also apply, even if there be no dispute pending, for the years subsequent to the year ending on any day in 1962, provided there is a dispute pending in respect of an earlier year. By section 1 (4) the provisions of the Act have effect in respect of the accounting year commencing on any day in the year 1964 and in respect of every subsequent accounting year. But by the application of section 33 the scheme of the Act is related back to three accounting years ending on any day in 1962, in 1963 and in 1964.

Application of the Act retrospectively therefore depends upon pendency immediately before 29th May, 1965 of an industrial dispute regarding payment of bonus relating to the year specified in section 33. If there be no such dispute pending immediately before the date on which the Act

becomes operative, an establishment will be governed by the provisions of the Full Bench Formula and will be liable to pay bonus only if there is adequate profit which would justify payment of bonus. Assuming that the classification is founded on some intelligible differential, the differential has no rational relation to the object sought to be achieved by the statutory provision, namely, of ensuring peaceful relations between capital and labour by making an equitable distribution of the surplus profits of the year. Arbitrariness of the classification becomes more pronounced when it is remembered that in respect of the years subsequent to the year for which the dispute is pending, liability under the Act is attracted even if for such subsequent years no dispute is pending. Imposition of the onerous liability prescribed by the Act for payment of bonus depending solely upon the fortuitous circumstance that a dispute relating to bonus is pending between the employer and workmen or some of them immediately before 29th May, 1965 is plainly arbitrary and the classification made on that basis is not reasonable.

There is one other ground which emphasises the arbitrary character of the classification. If a dispute relating to bonus is pending immediately before 29th May, 1965, in respect of the years specified in section 33 before the appropriate Government or before any authority under the Industrial Disputes Act or under any corresponding law, the provisions of the Bonus Act will be attracted; if the dispute is pending before the Supreme Court in appeal or before the High Court in a petition under Article 226 of the Constitution of India, the provisions of the Bonus Act will not apply. It is difficult to perceive any logical basis for making this distinction.

Section 34 (2) of the Payment of Bonus Act which freezes the ratio at which the available surplus in any accounting year has (subject to the maximum prescribed by section 11) to be distributed if in the base year bonus has been paid, is *ultra vires* as it infringes Article 14 of the Constitution of India.

Under section 34 (2) if the total bonus payable in any accounting year after the Act had come into force is less than the total bonus paid or payable in the "base year" under any award, agreement, settlement or contract of service, then bonus for the accounting year has to be determined according to the following scheme:

First determine the ratio of the bonus paid or payable to all employees for the base year as defined in *Explanation II (a)* to the gross profits as defined in *Explanation II (b)* of that year and apply that ratio to the gross profits to the accounting year and determine the allocable surplus. That allocable surplus will be distributed among the employees subject to the restriction that no employee shall be paid bonus which exceeds 20 per cent. of the salary or wage earned by an employee and if the allocable surplus so computed exceeds the amount of maximum bonus payable to the employees in the establishment then the provisions of section 15 shall, so far as may be, apply to the excess.

Bonus which becomes payable under section 34 (2) is therefore not worked out as a percentage of the available surplus, but as a fraction of gross profits computed according to the special formula. The sub-section thus makes a departure from the scheme for payment of bonus which pervades the rest of the Act and contemplates a somewhat complicated enquiry into the determination of the bonus payable.

Here again units of establishments which had paid bonus in the base year and those which had not paid bonus in the base year are separately classified without taking into consideration the special circumstances which operated upon the payment of bonus in the base year which may vary from establishment to establishment. The ratio under section 34 (2) so long as the Act remains in the statute book determines the minimum allocable surplus for each accounting year of those establishments which had paid bonus in the base year. Thus section 34 (2) imposes a special liability to pay bonus computed on the basis of a ratio determined on the working of the base year on an assumption that such ratio is the normal ratio not affected by any special circumstances and perpetuates for the duration of the Act that ratio for determining the minimum allocable surplus each year under the Act. If bonus contemplated to be paid under the Act is intended to make an equitable distribution of the surplus profits of a particular year, a scheme for computing the labour's share, which cannot be less than the amount determined by the application of a ratio derived from the working of the base year without taking into consideration the special circumstances governing that determination, is *ex facie* arbitrary and unreasonable. The vice of the provisions lies in the position of an arbitrary ratio governing distribution of surplus profits. Section 34 (2) clearly infringes Article 14 of the Constitution of India.

But the invalidity of sections 33, 34 (2) and 37 does not affect the validity of the remaining provisions of the Payment of Bonus Act. The invalid provisions are plainly severable from the rest of the Act.

Appeal by Special Leave from the Award Part I dated the 21st July, 1965 of the Industrial Court, Maharashtra, Bombay, in Reference (I C) No. 78 of 1963, and under Article 32 of the Constitution of India for the enforcement of Fundamental Rights.

In C.A.No.187 of 1966 :

N. A. Palkhivala, Senior Advocate (*R. J. Kolah*, *B. Dutta* and *C. C. Jain*, Advocates, and *Miss Bhuvnesh Kumari*, Advocate and *J. B. Dadachanji*, Advocate, of *M/s J. B. Dadachanji & Co.* with him), for Appellant.

H. K. Sowani, *K. Rajendra Chaudhuri* and *K. R. Chaudhuri*, Advocates, for Respondent.

In W.P. No. 3 of 1966 :

M. C. Setalvad, Senior Advocate (*G. B. Pai*, *P. K. Kurain*, *B. Dutta* and *Miss Bhuvnesh Kumari*, Advocates, and *J. B. Dadachanji*, Advocate, of *M/s. J. B. Dadachanji & Co.* with him), for Petitioner.

Niren De, Additional Solicitor-General of India and *N. S. Bindra* Senior Advocate (*R. H. Dhebar* and *B. R. G. K. Achar*, Advocates, with them), for Respondent No. 1.

V. A. Seyid Muhamnnad, Advocate-General for the State of Kerala (*A. G. Pudissery* and *M. R. Krishna Pillai*, Advocates, with him), for Respondents Nos. 2 and 3.

A. K. Sen, Senior Advocate (*K. L. Hathi*, Advocate, with him), for Respondent No. 4.

N. Sreekanttan Nair, President, Punjab Employees Union (in person), for Respondent No. 8.

In W.P. No. 32 of 1966 :

G. B. Pai, *B. Dutta* and *Miss Bhuvnesh Kumari*, Advocates, and *J. B. Dadachanji*, Advocate, of *M/s. J. B. Dadachanji & Co.*, for Petitioner.

Niren De, Additional Solicitor-General of India and *N. S. Bindra*, Senior Advocate (*R. H. Dhebar* and *R. N. Sachthey*, Advocates, with them), for Respondent No. 1.

V. A. Seyid Muhamnnad, Advocate-General for the State of Kerala (*M. R. Krishna Pillai*, Advocate, with him), for Respondents Nos. 2 and 3.

Janardan Sharma, Advocate, for Respondent No. 4.

A. K. Sen, Senior Advocate (*K. L. Hathi*, Advocate, with him), for Respondent No. 4-A.

H. K. Sowani and *K. R. Chaudhuri*, Advocates, for Intervener No. 1.

K. Rajendra Chaudhuri and *K. R. Chaudhuri*, Advocates, for Intervener No. 2.

Niren De, Additional Solicitor-General of India and *N. S. Bindra*, Senior Advocate (*R. H. Dhebar* and *B. R. G. K. Achar*) Advocates, with them, for Intervener No. 3.

N. A. Palkhivala, Senior Advocate (*J. B. Dadachanji*, Advocate, of *M/s. J. B. Dadachanji & Co.*, with him), for Interveners Nos. 4, 6, 9, 11 and 15.

N. M. Barot, Officer, Textile Union (in person), for Intervener No. 5.

I. N. Shroff, Advocate, for Intervener No. 7.

J. P. Goyal, Advocate, for Intervener No. 8.

S. R. Vasavada, Secretary of the Association (in person), for Intervener No. 10.

N. C. Chatterjee, Senior Advocate (*R. K. Garg*, *M. K. Rainaniurshi*, *Jitendra Sharma* and *Janardan Sharma*, Advocates, with him), *Satish K. Loomba*, Secretary of the Union (in person), for Intervener No. 12.

R. J. Kolah and *B. Narayanaswamy*, Advocates, and *J. B. Dadachanji*, Advocate of *M/s. J. B. Dadachanji & Co.*, for Intervener No. 13.

M. C. Setalvad, Senior Advocate (*R. J. Kolah*, Advocate, and *J. B. Dadachanji*, Advocate, of *M/s. J. B. Dadachanji & Co.*, with him), for Intervener No. 14.

I. M. Nanavati and O. P. Malhotra, Advocates, and *J. B. Dadachanji*, Advocate of *M/s. J. B. Dadachanji & Co.*, for Interveners Nos. 16 and 17.

Vithalbhai B. Patel and I. N. Shroff, Advocates, for Intervener No. 18.

The Court delivered the following Judgments.

Shah, J.—(for *K. N. Wanchoo*, *J.* himself and *S.M. Sikri, J.*)—During the pendency before the Industrial Court, Bombay, of a reference under section 73-A of the Bombay Industrial Relations Act, 1946, which arose out of a demand for payment of bonus for the years 1961 and 1962, the Payment of Bonus Ordinance III of 1965 was promulgated by the President on 29th May, 1965, with immediate effect. The representatives of the workmen claimed that even if the plea of the employers that the profits and loss account of the establishment for the years in question disclosed a loss, the Ordinance governed the dispute and that the employees were entitled to receive bonus at the minimum rate of 4 per cent. of the salary or wage or Rs. 40 whichever is higher. The Industrial Court upheld the plea of the workmen and directed the employers subject to the provisions of the Bonus Ordinance, 1965, to pay to each employee bonus for the year 1962 equivalent to 15 days of the salary or wages or Rs. 40 whichever is higher.

With Special Leave, the employers have appealed to this Court and they challenge the validity of the Payment of Bonus Act, 1965, which replaced Ordinance III of 1965, and especially of the provisions under which bonus at minimum rate is made payable under the Act.

Writ Petitions Nos. 3 of 1966 and 32 of 1966 are filed by two public limited companies. They challenge diverse provisions of the Act and contend that they are not liable to pay bonus under the machinery prescribed by the Act.

A synopsis of the development in the industrial law which led to the enactment of the Payment of Bonus Act, 1965 will facilitate appreciation of the questions argued at the Bar. Claims to receive bonus, it appears, were made by industrial employees for the first time in India in the towns of Bombay and Ahmedabad, after the commencement of the First World War when as a result of inflationary trends there arose considerable disparity between the living wage and the contractual remuneration earned by workmen in the textile industry. The employers paid to the workmen increase in wages, initially called "war bonus" and later called "special allowance." A Committee appointed by the Government of Bombay in 1922 to consider *inter alia*, "the nature and basis" of this bonus payments, reported that the workmen had a just claim against the employers to receive bonus, but the claim was not "customary, legal or equitable". During the Second World War the employers in the textile industry granted cash bonus equivalent to a fraction of actual wages (not including dearness allowance) but even this was a voluntary payment made with a view to keep labour contented.

In the dispute for payment of bonus for the years 1948 and 1949 in the textile industry in Bombay, the Industrial Court expressed the view that since labour as well as capital employed in the industry contribute to the profits of the industry, both are entitled to claim a legitimate return out of the profits of an establishment, and evolved a formula for charging certain prior liabilities on the gross profits of the accounting year, and awarding a percentage of the balance as bonus to the workmen. In adjudicating upon the claim for bonus, the Industrial Court excluded establishments which had suffered loss in the year under consideration from the liability to pay bonus. In appeals against the award relating to the year 1949, the Labour Appellate Tribunals broadly approved of the method for computing bonus as a fraction of surplus profit.

According to the formula which came to be known as the "Full Branch Formula", surplus available for distribution had to be determined by debiting the following prior charges against gross profits :

- (1) Provision for depreciation ;
- (2) Reserve for rehabilitation ;

(3) Return of 6 per cent. on the paid-up capital ;

(4) Return on the working capital at a lower rate than the return on paid-up capital ;

and from the balance called " available surplus " the workmen were to be awarded a reasonable share by way of bonus for the year.

This Court considered the applicability of this formula to claims for bonus in certain decisions; *Muir Mills Co. Ltd. v. Suti Mills Mazdoor Union, Kanpur*¹, *Baroda Borough Municipality v. Its Workmen*², *Sree Meenakshi Mills Ltd. v. Their Workmen*³ and *The State of Mysore v. The Workers of Kolar Gold Mines*⁴. The Court did not commit itself to acceptance of the formula in its entirety, but ruled that bonus is not a gratuitous payment made by the employer to his workmen, nor a deferred wage, and that where wages fall short of the living standard and the industry makes profit part of which is due to the contribution of labour, a claim for bonus may legitimately be made by the workmen. The Court however did not examine the propriety nor the order of priorities as between the several charges and their relative importance, nor did it examine the desirability of making any variation, change or addition in the Formula. These problems were for the first time elaborately considered by this Court in the *Associated Cement Companies Ltd. v. Its Workmen*⁵. Since that decision numerous cases have come before this Court in which the basic formula has been accepted with some elaboration. The principal incidents of the formula as evolved by the decisions of the Court may be briefly stated: Each year for which bonus is claimed is a self-contained unit and bonus will be computed on the profits of the establishment in that year. In giving effect to the formula as a general rule the gross profits determined after debiting the wage and dearness allowance paid to the employees, and other items of expenditure against total receipts, as disclosed by the profit and loss account are accepted, unless it appears that the debit entries are not supported by recognized accountancy practice or are posted *mala fide* with the object of reducing gross profits. Debit items which are wholly extraneous to or unrelated to the determination of trading profits are ignored. Similarly income which is wholly extraneous to the conduct of the business, e.g., book profits on account of revaluation of assets may not be included in the gross profits. Against the gross profits so ascertained the following items are charged as prior debits: (1) Depreciation: Such depreciation being only the normal or notional depreciation; (2) Income-tax payable for the accounting year on the balance remaining after deducting statutory depreciation. The income-tax to be deducted is not the actual amount, but the notional amount of tax at the rate for the year, even if on assessment no tax is determined to be payable. For the purpose of the Full Bench Formula income-tax at the rate provided must be deducted, but in the computation of income-tax statutory depreciation under the Indian Income-tax Act only may be allowed; (3) Return on paid up capital at 6 per cent. and on reserves used as working capital at a lower rate. In the *Associated Cement Companies Case*⁵, it was suggested that this rate should be 2 per cent in later cases 4 per cent. on the working capital was regarded as appropriate; (4) Expenditure for rehabilitation which includes replacement and modernisation of plant, machinery and buildings, but not for expansion of building, or additions to the machinery.

It is not open to the Tribunal in ascertaining the available surplus to extend by analogy the prior charges to be debited to gross profits. Therefore for example (a) allocations for debenture redemption fund; (b) losses in previous years which are written-off at the end of the year; (c) donations to a politic fund are not deducted from gross profits.

Rebate of income-tax available to the employer on the amount of bonus paid to the workmen cannot be added to the available surplus of profits determined in

1. (1955) S.C.J. 214 : (1955) 1 M.L.J. S.C. 24 : (1958) 2 M.L.J. (S.C.) 24 : (1958) M.L.J. (CrI.) 462 : (1958) S.C.R. 878 : A.I.R. 1958 S.C. 153.
 2. (1957) S.C.J. 95 : (1957) S.C.R. 33 : A.I.R. 1957 S.C. 110.
 3. (1958) S.C.J. 557 : (1958) 2 An.W.R. (S.C.) 4. (1958) S.C.J. 1243 : (1958) M.L.J. (CrI.) 959 : (1959) S.C.R. 895 : A.I.R. 1958 S.C. 923.
 5. (1959) S.C.R. 925 : A.I.R. 1959 S.C. 967.

accordance with the Full Bench Formula which should be taken into account only in distributing the available surplus between workmen, industry and employers.

The formula it is clear was not based on any strict theory of legal rights or obligations ; it was intended to make an equitable division of distributable profits after making reasonable allocation for prior charges.

Attempts made from time to time to secure revision of the Formula failed before this Court. In the *Associated Cement Companies case*¹, this Court observed :

“ The plea for the revision of the formula raised an issue which affects all industries ; and before any change is made in it, all industries and their workmen would have to be heard and their pleas carefully considered. It is obvious that while dealing with the present group of appeals, it would be difficult, unreasonable and inexpedient to attempt such a task.”

But the Court threw out a suggestion that the question may be “ comprehensively considered by a high-powered Commission ”, this suggestion was repeated in *The Ahmedabad Miscellaneous Industrial Workers' Union v. Ahmedabad Electricity Co., Ltd.*²

The Government of India then set up a Commission on 6th December, 1961, *inter alia* to define the concept of bonus, to consider in relation to industrial employments the question of payment of bonus based on profits and to recommend principles for computation of such bonus and methods of payment, to determine what the prior charges should be in different circumstances and how they should be calculated, to consider whether there should be lower limits irrespective of losses in particular establishments and upper limits for distribution in one year, and if so, the manner of carrying forward profits and losses over a prescribed period, and to suggest appropriate machinery and method for the settlement of bonus disputes. The Commission held an elaborate enquiry and reported that “ bonus ” was paid to the workers as a share in the prosperity of the establishment and recommended adherence to the basic scheme of the Bonus Formula *viz.*, determination of bonus as a percentage of gross profits reduced by certain prior charges, *viz.*, normal depreciation admissible under the Indian Income-tax Act including multiple shift allowance, income-tax and super-tax at the current standard rate applicable for the year for which bonus is to be calculated (but not super profits tax) and return on paid-up capital raised by issue of preference shares at the actual rate of dividend payable, on other paid-up capital at 7 per cent. and on reserves used as capital at 4 per cent. but not provision for rehabilitation. The Commission recommended that sixty per cent. of the available surplus should be distributed as bonus, the excess being carried forward and taken into account in the next year : the balance of forty per cent. should remain with the establishment into which would merge the saving in tax on bonus payable, and the aggregate balance thus left to the establishment may be intended to provide for gratuity, other necessary reserves, rehabilitation in addition to the provision made by way of depreciation in the prior charges, annual provision required for redemption of debentures, return of borrowings, payment of super profits-tax and additional return on capital. They recommended that the distinction between basic wages and dearness allowance for the purposes of expressing the bonus quantum should be abolished and that bonus should be related to wages and dearness allowance taken together : that minimum bonus should be 4 per cent. of the total basic wage and dearness allowance paid during the year or Rs. 40 to each worker, whichever is higher, and in the case of children the minimum should be equivalent to 4 per cent. of their basic wage and dearness allowance or Rs. 25 whichever is higher subject to reduction *pro rata* for employees who have not worked for the whole year, and that the maximum bonus should be equivalent to 20 per cent. of the total basic wage and dearness allowance paid during the year ; that the bonus formula proposed should be deemed to include bonus to employees drawing a total basic pay and dearness allowance upto Rs. 1,600 per month regardless of whether they were “ workmen ”

1. (1959) S.C.R. 925 : A.I.R. 1959 S.C. 967. A.I.R. 1962 S.C. 1255.
2. (1962) 2 S.C.J. 489 : (1962) 2 S.C.R. 934 :

inclusive of the fourth accounting year. By sub-section (3) it is provided that principle of "set-on" and "set-off" as illustrated in the Fourth Schedule shall apply to all other cases not covered by sub-section (1) or sub-section (2) for the purpose of payment of bonus under the Act. Bonus payable to an employee drawing wage or salary exceeding Rs. 750 per mensem has to be calculated as if the salary or wage were Rs. 750 per mensem, and an employee who has not worked for all the working days in an accounting year, the minimum bonus of Rs. 40 or Rs. 25 would be proportionately reduced (sections 12 and 13). Section 16 makes special provisions relating to payment of bonus to employees of establishments which have been newly set up. Sections 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 and 31 deal with certain procedural and administrative matters. By section 20 establishments in the public sector are, in certain eventualities, also made subject to the provisions of the Act. Section 32 excludes from the operation of the Act employees of certain classes and certain industries specified therein. By section 33 the Act is made applicable to pending industrial disputes (regarding payment of bonus relating to any accounting year not being an accounting year earlier than the accounting year ending on any day in the year 1962) immediately before 29th May, 1965, before the appropriate Government or any Tribunal or other authority under the Industrial Disputes Act, 1947, or under any corresponding law, or where it is pending before the Conciliation Officer or for adjudication. By section 34 (1) the provisions of the Act are declared to have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in the terms of any award, agreement, settlement or contract of service made before 29th May, 1965. Sub-section (2) of section 34 makes special overriding provisions regarding payment of bonus to employees computed as a percentage of gross profits reduced by direct taxes payable for the year (subject to the maximum prescribed by section 11), when bonus has been paid by the employer to workmen in the "base year" as defined in *Explanation II*. By section 36 the appropriate Government is authorised, having regard to the financial position and other relevant circumstances of any establishment or class of establishments, to exempt for such period as may be specified therein such establishment or class of establishments from all or any of the provisions of the Act and by section 37 power is conferred upon the Central Government by order to make provision, not inconsistent with the purposes of the Act, for removal of difficulties or doubts in giving effect to the provisions of the Act.

The scheme of the Act, broadly stated, is four dimensional :

(1) to impose statutory liability upon an employer of every establishment covered by the Act to pay bonus to employees in the establishment ;

(2) to define the principle of payment of bonus according to the prescribed Formula ;

(3) to provide for payment of minimum and maximum bonus and linking the payment of bonus with the scheme of "set-off and set-on" ; and

(4) to provide machinery for enforcement of the liability for payment of bonus.

Ordinarily a scheme imposing fresh liability, would, it is apprehended, be made prospective, leaving the pending disputes to be disposed of according to the law in force before the Act. But the Legislature has given by section 33 retrospective operation to the Act to certain pending disputes, and has sought to provide by section 34 while extinguishing all pre-existing agreements, settlements or contracts of service for freezing the ratio which existed in the base year on which the bonus would be calculated in subsequent years.

It was urged by Counsel for the employers that section 10 which provides for payment of minimum bonus, section 32 which seeks to exclude certain classes of employees from the operation of the Act, section 33 which seeks to apply the Act to certain pending disputes regarding payment of bonus and sub-section (2) of section 34

which freezes the ratio at which the available surplus in any accounting year has (subject to section 11) to be distributed if in the base year bonus has been paid, are *ultra vires*, because they infringe Articles 14, 19 and 31 of the Constitution. It was also urged that conferment of power of exemption under section 36 is *ultra vires* the Parliament in that it invests the appropriate Government with authority to exclude from the application of the Act, establishments or a class of establishments, if the Government are of the opinion having regard to the financial position and other relevant circumstances that it would not be in the public interest to apply all or any of the provisions of the Act. Power conferred upon the Government under section 37 is challenged on the ground that it amounts to delegation of legislative power when the Central Government is authorised to remove doubt or difficulty which had arisen in giving effect to the provisions of the Act.

The plea of invalidity of sections 32, 36 and 37 may be dealt with first. It is true that several classes of employees set out in clauses (i) to (xi) of section 32 are excluded from the operation of the Act. But the petitions and the affidavits in support filed in this Court are singularly lacking in particulars showing how the employees in the specified establishment or classes of establishments were similarly situate and that discrimination was practised by excluding those specified classes of employees from the operation of the Act while making it applicable to others. Neither the employees, nor the Government of India have chosen to place before us any materials on which the question as to the *vires* of the provisions of section 32 could be determined. There is a presumption of constitutionality of a statute when the challenge is founded on Article 14 of the Constitution, and the onus of proving unconstitutionality of the statute lies upon the person challenging it. Again many classes of employees are excluded by section 32 and neither those employees, nor their employers, have been impleaded before us. Each class of employees specified in section 32 requires separate treatment having regard to special circumstances and conditions governing their employment. We therefore decline to express any opinion on the plea of unconstitutionality raised before us in respect of the inapplicability of the Act to employees described in section 32.

By section 36 the appropriate Government is invested with power to exempt an establishment or a class of establishments from the operation of the Act, provided the Government is of the opinion that having regard to the financial position and other relevant circumstances of the establishment, it would not be in the public interest to apply all or any of the provisions of the Act. Condition for exercise of that power is that the Government holds the opinion that it is not in the public interest to apply all or any of the provisions of the Act to an establishment or class of establishments, and that opinion is founded on a consideration of the financial position and other relevant circumstances. Parliament has clearly laid down principles and has given adequate guidance to the appropriate Government in implementing the provisions of section 36. The power so conferred does not amount to delegation of legislative authority. Section 36 amounts to conditional legislation, and is not void. Whether in a given case, power has been properly exercised by the appropriate Government would have to be considered when that occasion arises.

But section 37 which authorises the Central Government to provide by order for removal of doubts or difficulties in giving effect to the provisions of the Act, in our judgment, delegates legislative power which is not permissible. Condition of the applicability of section 37 is the arising of the doubt or difficulty in giving effect to the provisions of the Act. By providing that the order made must not be inconsistent with the purposes of the Act, section 37 is not saved from the vice of delegation of legislative authority. The section authorises the Government to determine for itself what the purposes of the Act are and to make provisions for removal of doubts or difficulties. If in giving effect to the provisions of the Act any doubt or difficulty arises, normally it is for the Legislature to remove that doubt or difficulty. Power to remove the doubt or difficulty by altering the provisions of the Act would in

substance amount to exercise of legislative authority and that cannot be delegated to an executive authority. Sub-section (2) of section 37 which purports to make the order of the Central Government in such cases final accentuates the vice in sub-section (1), since by enacting that provision the Government is made the sole judge whether difficulty or doubt had arisen in giving effect to the provisions of the Act, whether it is necessary or expedient to remove the doubt or difficulty, and whether the provision enacted is not inconsistent with the purposes of the Act.

We may now turn to the challenge to section 10. Under the Full Bench Formula bonus being related to available surplus it can only be made payable by an employer of an establishment who makes profit in the accounting year to which the claim for bonus relates. If no profit was made there was no liability to pay bonus. As pointed out by this Court in *Muir Mills Company's case*¹.

"It is therefore clear that the claim for bonus can be made by the employees only if as a result of the joint contribution of capital and labour the industrial concern has earned profits. If in any particular year the working of the industrial concern has resulted in loss there is no basis nor justification for a demand for bonus. Bonus is not a deferred wage. The dividends can only be paid out of profits and unless and until profits are made no occasion or question can also arise for distribution of any sum as bonus amongst the employees. If the industrial concern has resulted in a trading loss, there would be no profits of the particular year available for distribution of dividends, much less could the employees claim the distribution of bonus during that year."

But by section 10 it is provided that even if there has resulted trading loss in the accounting year, the employer is bound to pay bonus at 4 per cent. of the salary or wage earned by the employee or Rs. 40 whichever is higher. This, it was urged, completely alters the character of bonus and converts what is a share in the year's profits in the earning of which the labour has contributed into additional wage. It was pointed out to us that in giving effect to the Full Bench Formula, this Court set aside the directions made by the Industrial Tribunal awarding minimum bonus where the establishment had suffered loss, and remanded the case for a fresh determination consistently with the terms of the Full Bench Formula; *New Maneck Chowk Spg. & Weaving Co. Ltd. v. Textile Labour Association*². In that case there was a five-year pact between the Ahmedabad Millowners' Association and the Textile Labour Association. After the expiry of the period, the Labour Association demanded bonus on the basis of the pact, but the Millowners claimed that the pact was contrary to the Full Bench Formula, and the claim was not sustainable. The Industrial Tribunal held that the pact did not "run counter to the law laid down by this Court in the *Associated Cement Companies' case*³, and the extension of the agreement for one more year would help, in promoting peace in the industry in Ahmedabad. This Court held that the agreement departed from the Full Bench Formula in the matter of bonus and when the Tribunal extended the agreement after the expiry of the stipulated period, it ignored the law as laid down by this Court as to what profit bonus was and how it should be worked out, and that the Tribunal had no power to do by extending the agreement to direct payment of minimum bonus for the year 1958 when there was no available surplus to pay minimum bonus.

Indisputably Parliament has the power to enact legislation within the constitutional limits to modify the Full Bench Formula even after it has received the approval of this Court. It was urged, however, that exercise of that power by treating establishments inherently dissimilar as in the same class and subject to payment of minimum bonus, amounted to making unlawful discrimination. It was said that establishments which suffered losses and establishments which made profits; establishments paying high rates of wages and establishments paying low rates of wages; establishments paying "bonus-added wages" and establishments paying ordinary wages; establishments paying higher dearness allowance and establishments paying lower dearness

¹ (1955) S.C.J. 214 : (1955) 1 M.L.J. (S.C.) 127 : (1955) 1 S.C.R. 991 : A.I.R. 1955 S.C. 170.

² (1961) 3 S.C.R. 1 : A.I.R. 1961 S.C. 867.
³ (1959) S.C.R. 925 : A.I.R. 1969 S.C. 967.

allowance, do not belong to the same class, and by imposing liability upon all these establishments to pay bonus at the statutory rate not below the minimum irrespective of the differences between them, the Parliament created inequality. It was also submitted that by directing establishments passing through a succession of lean years in which losses have accumulated and establishments which had made losses in the accounting year alone, to pay minimum bonus, unlawful discrimination was practised.

Section 10 at first sight may appear to be a provision for granting additional wage to employees in establishments which have not on the year's working an adequate allocable surplus to justify payment of bonus at the rate of 4 per cent on the wages earned by each employee. But the section is an integral part of a scheme for providing for payment of bonus at rates which do not widely fluctuate from year to year and that is sought to be secured by restricting the quantum of bonus payable to the maximum rate of 20 per cent and or carrying forward the excess remaining after paying bonus at that rate into the account of the next year, and by providing for carrying forward the liability for amounts drawn from reserves or capital to meet the obligation to pay bonus at the minimum rate. Under the Act, for computing the rate of payment of bonus each accounting year is distinct and bonus has to be worked out on the profits of the establishment in the accounting year. But it is not in the interest of capital or labour that there should be wide fluctuations in the payment of bonus by an establishment year after year. The object of the Act being to maintain peace and harmony between labour and capital by allowing the employees to share the prosperity of the establishment reflected by the profits earned by the contributions made by capital, management and labour, Parliament has provided that bonus in a given year shall not exceed 1/5th and shall not be less than 1/25th of the total earning of each individual employee, and has directed that the excess share shall be carried forward to the next year, and that the amount paid by way of minimum bonus not absorbed by the available profits shall be carried to the next year and be set off against the profits of the succeeding years. This scheme of prescribing maximum and minimum rates of bonus together with the scheme of "set off" and "set on" not only secures the right of labour to share in the prosperity of the establishment, but also ensures a reasonable degree of uniformity.

Equal protection of the laws is denied if in achieving a certain object persons, objects or transactions similarly circumstanced are differently treated by law and the principle underlying that different treatment has no rational relation to the object sought to be achieved by the law. Examined in the light of the object of the Act and the scheme of "set off" and "set on", the provision for payment of minimum bonus cannot be said to be discriminatory between different establishments which are unable on the profits of the accounting year to pay bonus merely because a uniform standard of minimum rate of bonus is applied to them.

The judgment of this Court in *Kumathat Thathunni Moopil Nair v The State of Kerala and another*¹ and especially the passage in the judgment of the majority of the Court at page 92, has not enunciated any broad proposition as was contended for on behalf of the employers, that when persons or objects which are unequal are treated in the same manner and are subjected to the same burden or liability, discrimination inevitably results. In *Moopil Nair's case*¹, the validity of the Travancore-Cochin Land Tax Act, 1955, was challenged. By section 4 of the Act all lands in the State, of whatever description and held under whatever tenure, were charged with payment of land tax at a uniform rate to be called the basic tax. Owners of certain forest lands challenged certain provisions of the Act pleading that those provisions contravened Articles 14, 19 (1) (f) and 31 (1) of the Constitution. This Court held that the Act which obliged every person who held land to pay the tax at a uniform rate, whether he made any income out of the land, or whether the land was capable

1. (1961) 2 S.C.J. 269 : (1961) 3 S.C.R. 77 : A.I.R. 1961 S.C. 552.

of yielding any income, attempted no classification and that lack of classification by the Act itself created inequality, and was on that account hit by the prohibition against denial of equality before the law contained in Article 14. The Court also held that the Act was confiscatory in character, since it had the effect of eliminating private ownership of land through the machinery of the Act without proposing to acquire privately owned forests for the State. The Travancore-Cochin Land Tax Act, it is clear, contained several peculiar features ; it was in the context of these features that the Court held that imposition of a uniform liability upon lands which were inherently unequal in productive capacity amounted to discrimination, and that lack of classification created inequality. It was not said by the Court in that case that imposition of uniform liability upon persons, objects or transactions which are unequal must of necessity lead to discrimination. Ordinarily it may be predicated of unproductive agricultural land that it is incapable of being put to profitable agricultural use at any time. But that cannot be so predicated of an industrial establishment which has suffered loss in the accounting year, or even over several years successively. Such an establishment may suffer loss in one year and make profit in another. Section 10 undoubtedly places in the same class establishments which have made inadequate profits not justifying payment of bonus, establishments which have suffered marginal loss, and establishments which have suffered heavy loss. The classification so made is not unintelligible ; all establishments which are unable to pay bonus under the scheme of the Act, on the result of the working of the establishment, are grouped together. The object of the Act is to make an equitable distribution of the surplus profits of the establishment with a view to maintain peace and harmony between the three agencies which contribute to the earning of profits. Distribution of profits which is not subject to great fluctuations year after year, would certainly conduce to maintenance of peace and harmony and would be regarded as equitable, and provision for payment of bonus at the statutory minimum rate, even if the establishment has not earned profit is clearly enacted to ensure the object of the Act.

Whether the scheme for payment of minimum bonus is the best in the circumstances, or a more equitable method could have been devised so as to avoid in certain cases undue hardship is irrelevant to the enquiry in hand. If the classification is not patently arbitrary, the Court will not rule it discriminatory merely because it involves hardship or inequality of burden. With a view to secure a particular object a scheme may be selected by the Legislature, wisdom whereof may be open to debate: it may even be demonstrated that the scheme is not the best in the circumstances and the choice of the Legislature may be shown to be erroneous, but unless the enactment fails to satisfy the dual test of intelligible classification and rationality of the relation with the object of the law, it will not be subject to judicial interference under Article 14. Invalidity of legislation is not established by merely finding faults with the scheme adopted by the Legislature to achieve the purpose it has in view. Equal treatment of unequal objects, transactions of persons is not liable to be struck down as discriminatory unless there is simultaneously absence of a rational relation to the object intended to be achieved by the law. Plea of invalidity of section 10 on the ground that it infringes Article 14 of the Constitution must therefore fail.

We need say nothing at this date about the plea that section 10 by imposing unreasonable restrictions infringes the fundamental freedom under Article 19 (1) (g) of the Constitution, for by the declaration of emergency by the President under Article 352, the protection of Article 19 against any legislative measure, or executive order which is otherwise competent, stands suspended. The plea that section 10 infringes the fundamental freedom under Article 31 (1) of the Constitution also has no force. Clause (1) of Article 31 guarantees the right against deprivation of property otherwise than by authority of law. Compelling an employer to pay sums of money to his employees which he has not contractually rendered himself liable to pay may amount to deprivation of property, but the protection against depriving a person of his property under clause (1) of Article 31 is available only if the deprivation is not by authority of law. Validity of the law authorising deprivation of property may be challenged on three grounds ; (i) incompetence of the authority which has

enacted the law ; (ii) infringement by the law of the fundamental rights guaranteed by Chapter III of the Constitution and (iii) violation by the law of any express provisions of the Constitution. Authority of the Parliament to legislate in respect of bonus is not denied and the provision for payment of bonus is not open to attack on the ground of infringement of fundamental rights other than those declared by Article 14 and Article 19 (1) (g) of the Constitution. Our attention has not been invited to any prohibition imposed by the Constitution which renders a statute relating to payment of bonus invalid. We are therefore of the view that section 10 of the Bonus Act is not open to attack on the ground that it infringes Article 31 (1).

We may now turn to section 33 of the Act. The section provides ;

“Where, immediately before the 29th May, 1965, any industrial dispute regarding payment of bonus relating to any accounting year, not being an accounting year earlier than the accounting year ending on any day in the year 1962, was pending before the appropriate Government or before any Tribunal or other authority under the Industrial Disputes Act, 1947 (XIV of 1947), or under any corresponding law relating to investigation and settlement of industrial disputes in a State, then, the bonus shall be payable in accordance with the provisions of this Act in relation to the accounting year to which the dispute relates and any subsequent accounting year, notwithstanding that in respect of that subsequent accounting year no such dispute was pending.

Explanation.—A dispute shall be deemed to be pending before the appropriate Government where no decision of that Government on any application made to it under the said Act or such corresponding law for reference of that dispute to adjudication has been made or where having received the report of the Conciliation Officer (by whatever designation known) under the said Act or law, the appropriate Government has not passed any order refusing to make such reference.”

The section plainly seeks to apply the provisions of the Act to a pending dispute, if the dispute relates to payment of bonus for any accounting year not being an accounting year earlier than the accounting year ending on any day in the year, 1962, and is pending on 29th May, 1965, before the Government or other authority under the Industrial Disputes Act or any other corresponding law. The provisions of the Act also apply even if there be no dispute pending for the year subsequent to the year ending on any day in the year 1962, provided there is a dispute pending in respect of an earlier year. By section 1 (4) the provisions of the Act have effect in respect of the accounting year commencing on any day in the year 1964 and in respect of every subsequent accounting year. But by the application of section 33 the scheme of the Act is related back to three accounting years ending on any day in 1962, in 1963 and in 1964.

In considering the effect of section 33 regard must first be had to section 34 (1) which provides that save as otherwise provided in the section, the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in the terms of any award, agreement, settlement or contract of service made before 29th May, 1965. All previous awards, agreements, settlements or contracts of service made before 29th May, 1965, therefore are, since the commencement of the Act rendered ineffective, and if there be a dispute relating to bonus pending on the date specified for the year ending on any day in 1962 or thereafter, before any appropriate Government or before any authority under the Industrial Disputes Act, bonus shall be computed and paid in the manner provided by the Act. Even if in respect of a year there is no such dispute pending on 29th May, 1965, because of a dispute pending in respect of an earlier year, not being earlier than the year ending on any day in 1962, the same consequences follow.

Application of the Act involves departure in many respects from the scheme of computation of bonus under the Full Bench Formula. Under the Full Bench Formula bonus was a percentage of total wage not inclusive of dearness allowance, and in the computation of available surplus rehabilitation allowance was admissible as a deduction. It was also well-settled that an establishment which suffered loss in the accounting year was not liable to pay bonus ; and a reference under the Industrial Disputes Act on a claim to bonus could be adjudicated upon only if the claimants

were workmen as defined in the Industrial Disputes Act. Since the expression "industrial dispute" used in section 33 has not been defined in the Payment of Bonus Act, the definition of that expression in the Industrial Disputes Act will apply (*vide* section 2 (22)). The expression "industrial dispute" under the Industrial Disputes Act *inter alia* means a dispute or difference between employer and workmen which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person—section 2 (k) : and the expression "workmen" as defined in section 2 (s) of the Industrial Disputes Act means,

"any person (including an apprentice) employed in any industry to do any skilled or unskilled manual, supervisory, technical or clerical work for hire or reward. * * *

* * * but does not include any such person—

"(i) * * * * *

(ii) * * * * *

(iii) who is employed mainly in a managerial or administrative capacity ; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding five hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of managerial nature."

Therefore no dispute relating to bonus between an employer and persons employed in managerial or administrative capacity or persons employed in supervisory capacity drawing wages exceeding Rs. 500 per mensem could be referred under the Industrial Disputes Act. But under section 33 a pending industrial dispute between the workmen and the employer, by reason of the application of the Act gives rise to a statutory liability in favour of all employees of the establishment as defined under the Act by section 2 (13) for payment of bonus under the scheme of the Act. Whereas under the Industrial Disputes Act a dispute could only be raised by employees who were workmen within the meaning of the Act, under the scheme of the Act statutory liability is imposed upon the employer to pay to all his employees as defined in section 2 (13) bonus at the rates prescribed by the Act. Even if before 29th May, 1965, there had been a settlement with some workmen or those workmen had not made any claim 'previously, and there would on that account be no industrial dispute pending *qua* those workmen, pendency of a dispute relating to bonus in which some other workmen are interested imposes statutory liability upon the employer to pay bonus to all employees in the establishment. Even if the employer had suffered loss or the available surplus was inadequate, the employer will by virtue of section 33 be liable to pay minimum bonus at the statutory rate ; the formula for computation of gross profits and available surplus will be retrospectively altered and a percentage of wages inclusive of dearness allowance will be allowed as bonus to all employees (whether they were under the Full Bench Formula entitled to bonus or not), in computing the available surplus rehabilitation will not be taken into account, and bonus will also have to be paid to employees who were not entitled thereto in the year of account. Application of the Act for the year for which the bonus dispute is pending therefore creates an onerous liability on the employer concerned because:

(1) employees who could not claim bonus under the Industrial Disputes Act become entitled thereto merely because there was a dispute pending between the workmen in that establishment, or some of them and the employer *qua* bonus ;

(2) workmen who had under agreements, settlements, contracts or awards become entitled to bonus at certain rates cease to be bound by such agreements settlements, contracts or even awards and become entitled to claim bonus at the rate computed under the scheme of the Act :

(3) basis of the computation of gross profits, available surplus and bonus is completely changed ;

(4) the scheme of "set on" and "set off" prescribed by section 15 of the Act becomes operative and applies to establishments as from the year in respect of which the bonus dispute is pending ; and

(5) the scheme of the Act operates not only in respect of the year for which the bonus dispute was pending, but also in respect of subsequent years for which there is no bonus dispute pending.

If therefore in respect of an establishment there had been a settlement or an agreement for a subsequent year, pendency of a dispute for an earlier year before the authority specified in section 33 is sufficient to upset that agreement or settlement and a statutory liability for payment of bonus according to the scheme of the Act is imposed upon the employer. Application of the Act retrospectively therefore depends upon the pendency immediately before 29th May, 1965, of an industrial dispute regarding payment of bonus relating to any accounting year not earlier than the year ending on any day in 1962. If there be no such dispute pending immediately before the date on which the Act becomes operative, an establishment will be governed by the provisions of the Full Bench Formula and will be liable to pay bonus only if there be adequate profits which would justify payment of bonus. If however, a dispute is pending immediately before 29th May, 1965, the scheme of the Act will apply not only for the year for which the dispute is pending, but even in respect of subsequent years. Assuming that the classification is founded on some intelligible differentia which distinguishes an establishment, from other establishments, the differentia has no rational relation to the object sought to be achieved by the statutory provision, *viz.*, of ensuring peaceful relations between capital and labour by making an equitable distribution of the surplus profits of the year. Arbitrariness of the classification becomes more pronounced when it is remembered that in respect of the year subsequent to the year for which the dispute is pending, liability prescribed under the Act is attracted even if for such subsequent years no dispute is pending, whereas to an establishment in respect of which no dispute is pending immediately before 29th May, 1965, no such liability is attracted. Therefore two establishments similarly circumstanced having no dispute pending relating to bonus between the employers and the workmen in a particular year would be liable to be dealt with differently if in respect of a previous year (covered by section 33) there is a dispute pending between the employer and the workmen in one establishment and there is no such dispute pending in the other.

Liability imposed by the Act for payment of bonus if for reasons already set out more onerous than the liability which had arisen under the Full Bench Formula prior to the date of the Act. Imposition of this onerous liability depending solely upon the fortuitous circumstance that a dispute relating to bonus is pending between workmen or some of them immediately before 29th May, 1965, is plainly arbitrary and classification made on that basis is not reasonable.

There is one other ground which emphasizes the arbitrary character of the classification. If a dispute relating to bonus is pending immediately before 29th May, 1965, in respect of the years specified in section 33 before the appropriate Government or before any authority under the Industrial Disputes Act or under any corresponding law, the provisions of the Act will be attracted; if the dispute is pending before this Court in appeal or before the High Court in a petition under Article 226, the provisions of the Act will not apply. It is difficult to perceive any logical basis for making a distinction between pendency of a dispute relating to bonus for the years in question before this Court or the High Court, and before the Industrial Tribunal or the appropriate Government. This Court is under the Constitution competent to hear and decide a dispute pending on 29th May, 1965, relating to bonus as a Court of Appeal, but is not required to apply the provisions of the Act. If because of misconception of the nature of evidence or failure to apply rules of natural justice or misapplication of the law, this Court sets aside an award made by the Industrial Tribunal and remands the case which was pending on 29th May, 1965, for rehearing, the Industrial Court will have to deal with the case under Full Bench Formula and not under the provisions of the Act. The High Court jurisdiction in a petition under Article 226 to issue an order or direction of the Industrial Tribunal invalid, and issue of such writ, order

will ordinarily involve retrial of the proceeding. Again pendency of a dispute in respect of the previous year before the appropriate Government or the Industrial Tribunal will entail imposition of a statutory liability to pay bonus in respect of the year for which the dispute is pending, and also in respect of years subsequent thereto, but if immediately before 29th May, 1965, a proceeding arising out of a dispute relating to bonus is pending before a superior Court, even if it be for the years which are covered by section 33, statutory liability to pay bonus to employees will not be attracted. Take two industrial units—one has a dispute with its workmen or some of them, pending before the Government or before the authority under the Industrial Disputes Act and relating to an accounting year ending in the year 1962. For the years 1962, 1963 and 1964 this industrial unit will be liable to pay bonus according to the statutory formula prescribed by the Act, whereas another industrial unit in the same industry which may be regarded as reasonably similar would be under no such obligation, if it has on 29th May, 1965, no dispute relating to bonus pending because the dispute has not been raised or has been settled by agreement or by award or that the dispute having been determined by an award, had reached a superior Court by way of appeal or in exercise of the writ jurisdiction. There appears neither logic nor reason in the different treatment meted out to the two establishments. It is difficult to appreciate the rationality of the nexus—if there be any—between the classification and the object of the Act. In our view therefore section 33 is patently discriminatory.

By sub-section (2) of section 34 it is provided :

"If in respect of any accounting year the total bonus payable to all the employees in any establishment under this Act is less than the total bonus paid or payable to all the employees in that establishment in respect of the base year under any award, agreement, settlement or contract of service, then, the employees in the establishment shall be paid bonus in respect of that accounting year as if the allocable surplus for that accounting year were an amount which bears the same ratio to the gross profits of the said accounting year as the total bonus paid or payable in respect of the base year bears to the gross profits of the base year :

Provided that nothing contained in this sub-section shall entitle any employees to be paid bonus exceeding twenty per cent of the salary or wage earned to him during the account year :

Provided further that if in any accounting year the allocable surplus computed as aforesaid exceeds the amount of maximum bonus payable to the employees in the establishment under the first proviso, then, the provisions of section 15 shall, so far as may be, apply to such excess.

Explanation I.—For the purpose of this sub-section, the total bonus in respect of any accounting year shall be deemed to be less than the total bonus paid or payable in respect of the base year if the ratio of bonus payable in respect of the accounting year to the gross profits of that year is less than the ratio of bonus paid or payable in respect of the bonus base year to the goods profits of that year.

Explanation II.—In this sub-section,—

(a) "base year" means—

(i) in a case where immediately before the 29th May, 1965, any dispute of the nature specified in section 33 was pending before the appropriate Government or before any Tribunal or other authority under the Industrial Disputes Act, 1947 (XIV of 1947), or under any corresponding law relating to investigation and settlement of industrial disputes in a State, the accounting year immediately preceding the accounting year to which the dispute relates ;

(ii) in any other case, the period of twelve months immediately preceding the accounting year in respect of which this Act becomes applicable to the establishment ;

(b) "gross profits" in relation to the base year or, as the case may be, to the accounting year, means gross profits as reduced by the direct taxes payable by the employer in respect of that year."

This sub-section makes a departure from the scheme for payment of bonus which pervades the rest of the Act. The expression "allocable surplus" in section 34 (2) does not mean a percentage of the available surplus under section 2 (4) read with sections 5 and 6, as that expression is understood in the rest of the Act. It is a figure computed according to a special method. Under section 34 (2) if the total bonus payable in any accounting year after the Act had come into force is less than the total bonus paid or payable in the "base year" under any award, agreement, settlement or contract of service, then, bonus for the accounting year has to be determined according to the following scheme :

First determine the ratio of the bonus paid or payable to all employees (not workmen merely as defined in the Industrial Disputes Act) for the base year as defined in *Explanation II (a)* to the gross profits as defined in *Explanation II (b)* of that year, and apply that ratio to the gross profits as defined in *Explanation II* to the accounting year and determine the allocable surplus. That allocable surplus will be distributed among the employees subject to the restriction that no employee shall be paid bonus which exceeds 20 per cent of the salary or wage earned by an employee, and that if the allocable surplus so computed exceeds the amount of maximum bonus payable to the employees in the establishment then the provisions of section 15 shall so far as may be apply to the excess.

Gross profits which are to be taken into account for determining the ratio both in the accounting year and the base year are also specially defined for the purpose of this sub-section. They are not the gross profits as determined under the Full Bench Formula, nor under section 4 of the Act, but by a method specially prescribed by the *Explanation*; they are gross profits under section 4 as reduced by the direct taxes payable by the employer in respect of that year. Under the Full Bench Formula bonus was determined as a percentage of the gross profits minus prior charges. Under section 5 of the Act available surplus of which the normal allocable surplus is a percentage is determined by deducting from the gross profits of the year the four heads of charges which are referred to under section 6—depreciation, development rebate or development allowance, direct taxes and other sums specified in the Third Schedule. But in applying the scheme under section 34 only the direct taxes are debited. Bonus which becomes payable under section 34 (2) is therefore not worked out as a percentage of the available surplus, but as a fraction of gross profits computed according to the special formula. The expression “base year” is also a variable unit; in any case where a dispute of the nature specified in section 33 is pending immediately before 29th May, 1965, before the authorities specified in section 33, the accounting year immediately preceding the accounting year to which the dispute relates is the base year; in other cases a period of twelve months immediately preceding the accounting year in respect of which the Act becomes applicable to the establishment is the base year. For instance, if there be a dispute pending in respect of the accounting year on any day ending in 1962, 1963 or 1964, the base years will be the accounting years ending on a day in 1961, 1962 or 1963 as the case may be. If there be no dispute pending the period of twelve months immediately preceding the accounting year in which the Act becomes applicable to the establishment is the base year. Determination of the base year therefore depends upon the pendency or otherwise of a bonus dispute immediately before 29th May, 1965, for any of the years ending on any day in 1962, 1963 and 1964.

There is also a special method for determining whether the total bonus payable to all the employees is less than the total bonus paid or payable in respect of the base year. By the *First Explanation* it is provided that the total bonus in respect of any accounting year shall be deemed to be less than the total bonus paid or payable in respect of the base year, if the ratio of bonus payable in respect of the accounting year to the gross profits of that year is less than the ratio of bonus paid or payable in respect of the base year to the gross profits of that year.

Section 34 (2) contemplates a somewhat complicated enquiry into the determination of the bonus payable. Gross profits of the base year being determined in the manner prescribed by the Act and reduced by the direct taxes payable by the employers in respect of that year, the ratio between the gross profits and the bonus paid or payable in respect of that base year is to be applied to the gross profits of the accounting year to determine the allocable surplus. Apart from the complexity of the calculation involved it was forcefully pointed out before us that in certain cases the ratio may be unduly large or even infinite. In order to buy peace and in the expectation that in future the working of the establishments would be more profitable, employers had in certain cases paid bonus out of reserves even though there was no gross profit or insufficient gross profit, and those establishments are

under section 34 (2) saddled with liability to allocate large sums of money wholly disproportionate to or without any surplus profits; and even to the amount which would be payable if the scheme of the Act applied. For in cases where there were no gross profit, the ratio between the amount paid or payable as bonus and gross profit would reach infinity; in cases where the gross profits were small and substantial amounts were paid or became payable by way of bonus, the ratio may become unduly large. These are not cases hypothetical but practical, which had arisen in fact, and application of the ratio irrevocably fixes the liability of the establishment to set apart year after year large amounts whether the establishment made profits or not towards allocable surplus.

Payment of bonus by agreement was generally determined not by legalistic considerations and not infrequently generous allowances were made by employers as bonus to workmen to buy peace especially where industrywise settlements were made in certain regions, and weak units were compelled to fall in line with prosperous units in the same industry and had to pay bonus even though on the result of the working of the units no liability to pay bonus on the application of the Full Bench Formula could arise. But if in the base year such payment was made, for the duration of the Act the ratio becomes frozen and the total bonus payable to the employees in the establishment under the Act can never be less than the bonus worked out on the application of the ratio prescribed by section 34 (2).

Here again units or establishments which had paid bonus in the base year and those which had not paid bonus in the base year are separately classified without taking into consideration the special circumstances which operated upon the payment of bonus in the base year which may vary from establishment to establishment. The ratio under section 34 (2), so long as the Act remains on the statute book, determines the minimum allocable surplus for each accounting year of those establishments which had paid bonus in the base year. The fact that under sub-section (3) the employees and the employers are not precluded from entering into agreements for granting bonus to the employees under a formula which is different from that prescribed under the Act has little significance. If by statute a certain ratio is fixed which determines the bonus payable by the employer whether or not the profits of the accounting year warrant payment of bonus at that rate, it would be futile to expect the employees to accept anything less than what has been statutorily prescribed.

In our view section 34 imposes a special liability to pay bonus determined on the gross profits of the base year on an assumption that the ratio which determines the allocable surplus is the normal ratio not affected by any special circumstance and perpetuates for the duration of the Act that ratio for determining the minimum allocable surplus each year. If bonus contemplated to be paid under the Act is intended to make an equitable distribution of the surplus profits of a particular year, a scheme for computing labour's share which cannot be less than the amount determined by the application of a ratio derived from the working of the base year without taking into consideration the special circumstances governing that determination is *ex facie* arbitrary and unreasonable. The Additional Solicitor-General appearing for the Union of India and the representatives of the Labour Unions and Counsel appearing for them contended in support of their plea that section 34 (2) was not invalid because the ratio was intended to stabilize the previous grant of bonus and to maintain in favour of labour whatever was achieved by collective bargaining in the base year. But the validity of a statute is subject to judicial scrutiny in the context of fundamental freedoms guaranteed to employers as well as employees and the freedom of equal protection of the laws becomes chimerical, if the only ground in support of the validity of a statute *ex facie* discriminatory is that Parliament intended, inconsistently with the very concept of bonus evolved by it to maintain for the benefit of labour an advantage which labour had obtained in an earlier year, based on the special circumstances of that year, without any enquiry whether that advantage may reasonably be granted in subsequent years according to the principles evolved by it and for securing the object of the Act. If the concept of bonus as allocation of an

equitable share of the surplus profits of an establishment to the workmen who have contributed to the earning has reality, any condition that the ratio on which the share of one party computed on the basis of the working of an earlier year, without taking into consideration the special circumstances which had a bearing on the earning of the profits and payment of bonus in that year, shall not be touched, is in our judgment arbitrary and unreasonable. The vice of the provision lies in the position of an arbitrary ratio governing distribution of surplus profits. In our view, section 34 (2) is invalid on the ground that it infringes Article 14 of the Constitution. It is in the circumstances unnecessary to consider whether the provisions of section 33 and section 34 (2) are invalid as infringing the fundamental rights conferred by Articles 19 (1) (g) and 31 (1).

But the invalidity of sections 33 and 34 (2) does not affect the validity of the remaining provisions of the Act. These two provisions are plainly severable. All proceedings which are pending before the Act came into force including those which are covered by section 33 will therefore be governed by the Full Bench Formula and that in the application of the Act the special ratio for determining the allocable surplus under section 34 (2) will be ignored, for application of the Full Bench Formula to pending proceedings on 29th May, 1965, and refusal to apply the special ratio in the determination of allocable surplus under section 34 (2) does not affect the scheme of the rest of the Act. The declaration of invalidity of section 37 which confers upon the Central Government power to remove difficulties also does not affect the validity of the remaining provisions of the Act.

The Industrial Tribunal has awarded to the workmen of the Jalan Trading Company bonus at the minimum rate relying upon section 33 of the Act. The claim for bonus related to the year 1962, and could be upheld only if section 10 was attracted by the operation of section 33. But we have held that section 33 is invalid. It is now common ground that the appellant company had suffered loss in 1962. The profit and loss account was accepted by the workmen before the Tribunal. Civil Appeal No. 187 of 1966 will therefore be allowed and the order passed by the Industrial Tribunal imposing liability for payment of minimum bonus set aside. In Writ Petitions Nos. 3 of 1966 and 32 of 1966, it is declared that sections 33 and 34 (2) are invalid as infringing Article 14 of the Constitution, and that section 37 is invalid in that it delegates to the executive authority legislative powers.

There will be no order as to costs in all these proceedings.

Hidayatullah, J. (for himself and *V. Ramaswami, J.*).—The judgment in this appeal shall also govern Writ Petitions Nos. 3 of 1966 (*The Management of M/s. Punalur Paper Mills Ltd., Kerala State v. The Union of India and others*) and 32 of 1966 (*The Travancore Rayons Ltd. v. The Union of India and others*). The Jalan Trading Co. Pvt. Ltd. (appellant) was the opposite party to an industrial dispute concerning a claim for bonus for the years 1961, 1962 raised by the workmen of the Company represented by the Mill Mazdoor Sabha, Bombay (respondents). The Sabha gave a notice of change on 13th May, 1963 and demanded 25 per cent. of the total wages as bonus for each of the two years. This demand was refused by the employers on the ground, among others, that there was no surplus as the Company was carrying forward a big loss. Conciliation was tried but failed and a reference was made by the Sabha to the Industrial Court, Maharashtra, Bombay under section 73-A of the Bombay Industrial Relations Act. While this reference was pending the Payment of Bonus Ordinance of 29th May, 1965 came into force. Applying section 10 of the Ordinance, the Industrial Court awarded for the year 1962, 4 per cent. of the total salary or wage or Rs. 40 (whichever was greater) to the workmen entitled under the Ordinance, regardless of the absence of profit and set down the dispute concerning 1961 for trial. In this appeal, by Special Leave against the said order the validity of section 10 of the Payment of Bonus Act, which received the assent of the President on 25th September, 1965, and replaced the Ordinance with a few changes, is challenged.

In Writ Petitions Nos. 3 and 32 of 1966, heard with this appeal, two other companies (The Punalur Paper Mills Ltd. and Travancore Rayons Ltd.) question the validity of section 10 and also sections 32-37 of the Act, in respect of bonus for one or more of the years 1962, 1963 and 1964. These sections, they contend, cut across the accepted and well-defined concept of bonus and lead to discrimination and anomalies of various sorts, and, of course, incidentally to the payment of a larger amount as bonus than would be payable under subsisting agreements or the previous state of law. Comparative tables to demonstrate these and other points are filed with the petitions.

At the hearing of this appeal and the two writ petitions many Companies and Workers' Unions intervened in one or more of them. The contending parties also intervened in matters other than their own. The operative sections of the Bonus Act were challenged as *ultra vires* the Constitution. These sections lay down the machinery for calculation of bonus generally and in particular on foot of a past base year, apply the provisions with modifications to pending cases, permit Government to exclude establishments from the operation of the provisions of the Act and pass orders for the removal of doubts and difficulties in the application of the Act. We shall refer to terms of the relevant sections presently.

In short, the departures from the existing laws on the subject of bonus to workmen, are challenged in principle and also as discriminatory. The arguments were full and were illustrated by examples which ingenuity of Counsel or reliance on statistic could suggest. To understand the arguments it is necessary to glance at the history of payment of bonus in India, the principles on which it was based and the relevant provisions of the Act impugned before us.

The payment of bonus had its origin in the generosity of the textile employers during the First World War when they voluntarily gave away 10 per cent. (later up to 35 per cent.) additional wages as "war bonus." The profits were then high and this extra payment gave a boost to production and indirectly to the profits of the employers. When the lean years came payment of bonus was sought to be stopped but disputes and strikes followed. The workmen had begun to consider "bonus" as one of their rights. The first dispute was settled by conciliation by the acceptance of bonus equal to one month's wages, with a tacit understanding that this payment could be more if profit allowed. The second had to be referred to a Committee presided over by Chief Justice Macleod of Bombay. The Committee found no legal foundation for the claim especially when there were no profits.

During the Second World War the question of dearness allowance was raised but it included consideration of bonus etc. A Board of Conciliation with Mr. Justice Rangnekar as Chairman, awarded As. 2 per person per day as dearness allowance but that was obviously a mere nothing. Therefore, at the intercession of Government a cash bonus of 12½ per cent. of wages (that is to say, As. 2 per rupee of wage) was agreed upon and given to workmen. Bonus was thereafter paid voluntarily for a number of years and was the result, by and large, of agreements of some sort.

When the law enjoining compulsory reference to adjudication of trade disputes came the question of bonus, as did many others, reached the Courts and the claim for bonus became an industrial claim and had to be settled on some tangible principle. Various reasons were advanced to justify the legality of the claim and the Courts accepted some of them. At first it was merely treated as rooted in fair play but later it was held to be claimable as of right and ranking in importance next only to the claim of minimum wages and dearness allowance which were considered the first liability of the employer. After the Industries Conference of 1947, grant of bonus became a settled fact, as a very slender means to bridge somewhat, the gap between actual and living wages. The workmen had become accustomed to expect additional payment to meet extraordinary expenditures, or, in other words, treated bonus as a kind of nest-egg for emergencies.

The principles underlying the grant of bonus were at first nebulous but after the deliberations of the Committee on Profit Sharing (1948), some clear principles began to emerge. The Labour Appellate Tribunal, Bombay then evolved a formula for calculation of the profits to find out the surplus from which the workmen could be paid. This formula goes under the name of "the Full Bench Formula." The first step in the application of the Formula was to ascertain gross profits. This was done by adding back to the net profits as shown in the Profit and Loss Account, all amounts transferred to reserves etc. and, in fact, all income except what could not be attributed to the efforts of labour. In this way depreciation, taxes paid and donations and such other items were all added back to determine the gross profits. From these gross profits were deducted notional normal depreciation and notional taxes, that is to say, not the depreciation or the taxes which the Income-tax Authorities would have allowed in the case, but which would be admissible on the amounts found under the Formula. There were further deductions of amounts as reserve for rehabilitation of machinery etc., of return on paid-up capital and on reserves employed as working capital. After these deductions were made the net amount was taken as the available surplus and bonus was awarded to the workmen according to the size of this surplus. There was no settled principle as to how the available surplus should be divided between the employers and workmen and this Court, in the absence of any discernible principles, suggested a half and half division. The Formula was approved and applied in numerous cases by this Court and when the Tribunal attempted to revise it this Court put down the attempts, and recommended the establishment of a Commission. At the second and third meetings of the 18th Session of the Standing Labour Committee in 1960 the proposal to establish a Commission was considered and was agreed upon. As a result the Government of India, on 6th December, 1961, appointed a Commission under the Chairmanship of Mr. M.R. Meher. The Commission made its recommendations and they were accepted by Government, with some modifications, by Resolution dated 2nd September, 1964. The Bonus Ordinance as well as the Bonus Act were passed to implement the recommendations accepted in the Government's Resolution.

The Full Bench Formula although not legislatively recognised, was binding as a decision of the Courts. In essence it was only a workable solution. It satisfied neither the employers nor the workmen. Disputes continued even though the Formula was generally adhered to. The workmen, while conceding that rehabilitation was necessary, used to represent that large sums deducted from the gross profits as rehabilitation reserves were not spent for that purpose. Often enough this was true. They also used to dispute the reserves used as working capital and asked the employers to prove what amount was so used. Lastly, there were quarrels, about the division of the available surplus. The employers, on the other hand, used to contend that if rehabilitation charges were not deducted depreciation allowable under the Indian Income-tax Act, being only a percentage of the written down value, was inadequate to enable rehabilitation of machinery etc. They also used to submit that the return on capital at 6 per cent was too little and, in fact, succeeded in getting the return on reserves employed as capital, increased from 2 per cent. to 4 per cent. It was in this context that the Bonus Commission made its recommendations. It is not necessary or profitable to summarise these recommendations in their entirety. Only the fundamental proposals can be mentioned here for we are concerned with them as part of the history lying at the back of the legislation impugned here, and because a great deal of thought went into the formulation of these proposals.

The Bonus Commission found it difficult to accept the proposition that bonus represented the means to bridge the gap between the actual and living wages but expressed the opinion that bonus afforded the means of bridging the gap between actual and need-based wages and that such a claim was admissible when profits exceeded a certain base. The formula suggested by the Bonus Commission was different in many particulars from the Full Bench Formula. A comprehensive mode for determining the gross profits was evolved and to the net profits disclosed in the Statement of Profit and Loss were added numerous items which it is not necessary to

mention here. From the gross profits the first deduction was depreciation and this was not the notional normal depreciation of the old Formula but the depreciation allowable under the Income-tax law including multiple-shift allowance. Income-tax and super-tax were next deducted. The development rebate which took the place of initial depreciation under the previous Income-tax law was not allowed to be deducted but the Commission was of opinion that the tax concession on account of development rebate should be retained by the employers and must, therefore, be deducted from the gross profits. As normal depreciation and the tax concession on development rebate were to be retained by the companies, rehabilitation charges were abolished. The super profits tax was not made a prior charge mainly because bonus was treated as expenditure under the Indian Income-tax Act and some saving to the employers was likely to result.

The Commission suggested a 7 per cent. return on paid-up capital and a 4 per cent. return on reserves employed as capital. The balance left after these deductions was the available surplus from which 60 per cent. was to be paid as bonus to workmen and 40 per cent. was to be retained by the employers. The Commission also suggested that the employers must pay a minimum bonus equal to 4 per cent. of the total basic wage and dearness allowance of Rs. 40 (whichever was greater) to each workman whether the allocable surplus permitted it or not and also set a ceiling on bonus by providing that not more than 20 per cent. of the total basic wage and dearness allowance bill may be paid as bonus in any year. If there were no profits or if profits could allow payment of bonus more than the 20 per cent. maximum, a principle of set on and set off was devised. The amount paid out as minimum bonus or the extra over and above the 20 per cent. maximum had to be carried forward to future years to be set on or set off against the profits in those years. In this way the payment of minimum bonus when no bonus was payable, was made less onerous and similarly the amount in excess of 20 per cent. which might have been paid as bonus under a 60 to 40 division was to be carried over to the future years to be available when the profits were low. The set on and set off were to be valid only for 4 years at the end of which the amounts available for set on or set off were to be ignored. The Commission also recommended payment of bonus to persons whose total basic pay and dearness allowance did not exceed Rs. 1,600 per month regardless of whether they were "workmen" or not according to the definition of this word in the Industrial Disputes Act. The amount of bonus, however, was flat after the basic wage and dearness allowance taken together reached Rs. 750 per month. In respect of new units bonus was to be payable from the 6th year or when profits (after wiping off old losses and allowing for depreciation etc.) permitted.

Government by its Resolution accepted these recommendations but with certain modifications. Government allowed deduction of all direct taxes from the gross profits and increased the return on capital to 8.5 per cent. (taxable) on paid-up equity capital and 6 per cent. on reserves for banks 7.5 per cent. and 5 per cent. respectively.) Government also gave retrospective effect to the recommendations of the Bonus Commission as amended by itself by resolving that they should apply to all bonus matters other than those cases in which settlement had been reached or decisions had been given already, relating to accounting year ending on any day in the calendar year 1962 in respect of which dispute was pending. The Ordinance and the Act follow the recommendations, of the Bonus Commission as modified in the Government Resolution. We shall now refer to the terms of the Act, contrasting them, where necessary, with the terms of the payment of Bonus Ordinance which has since been repealed.

The foregoing discussion of the recommendations of the Bonus Commission renders it unnecessary to quote many of the provisions of the Act which consists of 40 sections and four Schedules. Some terms, which have been used before by us, may be explained first. Bonus is payable from "available surplus" which is the result of certain deductions under section 6 from the gross profits determined in accordance with the provisions of Schedules I and II which apply respectively to banking companies and companies other than banking companies. "Allocable

surplus" in relation to a company (other than a banking company), which has not made arrangements prescribed under the Indian Income-tax Act for the declaration of payment within India of the dividends payable out of its profits in accordance with the provisions of section 194 of that Act, means 67 per cent. of the available surplus in the accounting year and in any other case 60 per cent. of the available surplus including any amount treated as available surplus under section 34 (2) to be mentioned hereafter. "Direct tax" means any tax chargeable under the Indian Income-tax Act, the Super Profits Tax Act, 1963, the Companies (Profits) Sur-tax Act, 1964, the Agricultural Income-tax law, and any other tax declared to be a direct tax. "Employee" means a person employed on a salary or wage which does not exceed Rs. 1,600 per month. "Salary or wage" means all remuneration (other than remuneration in respect of over-time work) capable of being expressed in terms of money, including dearness allowance but not including any other allowance, or amenity such as house accommodation, supply of light, water, medical attendance or foodgrains or other article or any travelling concession, bonus, contribution to Provident Fund, retrenchment compensation or gratuity or commission payable to the workmen.

The calculation of gross profits is to be done as laid down in the first two Schedules. In both the Schedules the net profits as shown in the Profit and Loss Account are adjusted by additions and subtractions to determine the gross profits for purposes of bonus. The available surplus is then reached by making deductions as laid down in section 6. Three of the deductions are applicable to all employers and the fourth deduction, which is return on capital is different in the case of different employers and the special deduction is set down separately for them. The first deduction is depreciation admissible under the Indian Income-tax Act and Agricultural Income-tax laws. Where, however, an employer was paying bonus under a settlement, award or agreement made before the date of the Ordinance he is entitled to deduct the notional normal depreciation at his option to be exercised once and for all before 29th May, 1966. The second deduction is the amount of development rebate or development allowance which the employer is entitled under the Income-tax Act to deduct from his income. The third deduction embraces all direct taxes subject to certain special provisions. The fourth deduction is return on capital and in respect of a company other than a banking company the deduction according to Schedule II is as follows:

"(i) The dividends payable on its preference share capital for the accounting year calculated at the actual rate at which such dividends are payable ;

(ii) 8.5 per cent of its paid up equity share capital as at the commencement of the accounting year :

(iii) 6 per cent. of its reserve shown in its balance-sheet as at the commencement of the accounting year, including any profits carried forward from the previous accounting year :

Provided that where the employer is a foreign company within the meaning of section 591 of the Companies Act, 1956 (I of 1956), the total amount to be deducted under this item shall be 8.5 per cent. on the aggregate of the value of the net fixed assets and the current assets of the company in India after deducting the amount of its current liabilities (other than any amount shown as payable by the company to its Head Office whether towards any advance made by the Head Office or otherwise or any interest paid by the company to its Head Office) in India."

The deduction varies in respect of banking companies, corporations, co-operative societies, licencees under the Electricity Supply Act, 1948 and other employers. After these deductions are made and the available surplus is determined the allocable surplus (either 67 per cent. or 60 per cent. as the case may be) is payable as bonus. The amount so payable is subject to an upper and a lower limit determined in relation to salary or wage of the workmen qualified to receive it. Under section 10 every workman is entitled to receive 4 per cent. or Rs. 40 (in the case of children below 15 years Rs. 25) whichever be greater, whether there are profits in the accounting year or not. Under section 11 the total amount payable as bonus in any accounting year may not exceed 20 per cent. of the total salary or wage bill. Although bonus is payable to employees drawing salary or wage up to Rs. 1,600 per month, the amount of bonus in any case cannot exceed the amount payable to a person whose salary or wage is Rs. 750 per month. Bonus is payable proportionately to the number of days on which the workman works. The principle of set on and set off of allocable surplus, as laid down by section 15, has been adverted to in brief already. It may be explained a little more

fully. If the allocable surplus exceeds the 20 per cent. upper limit, the excess in the accounting year is to be carried forward to be set on in the succeeding accounting years up to and inclusive of the 4th accounting year so as to be available for payment of bonus if the allocable surplus in those years falls below 20 per cent. Similarly, if minimum bonus of 4 per cent. of the wage bill is paid, despite loss, the amount so paid may be carried forward for four years for being set off against profits in the subsequent years. Schedule IV serves to illustrate the application of the principle of set on and set off by giving some illustrations. Section 16 makes special provision with respect to new establishments and new departments or undertaking in old establishments and generally gives them exemptions from payment of bonus for the first five years or till profit is made, whichever be earlier. Section 17 allows adjustment of customary and interim bonus against bonus payable under the Act. Sections 18 to 31 are regulatory in character providing for accounts, inspections, offences, penalties and protection of authorities. These do not concern us. Section 32 then exempts a 11 kinds of employers from the operation of the Act. Then follow section 33, which applies the Act to certain pending disputes regarding payment of bonus, section 34 which lays down certain special rules regarding the effect of laws and agreements inconsistent with the Bonus Act, section 36 which gives power of exemption, and section 37 which enables the Central Government, by order to remove any difficulty or doubt arising in giving effect to the provisions of the Act. Section 38 enables the Central Government to make rules and under section 39, the provisions of the Act are to be in addition to and not in derogation of the Industrial Disputes Act, 1947 or any corresponding law relating to investigation and settlement of industrial disputes in force in a State. Section 35, which we omitted, preserves intact the provisions of the Coal Mines Provident Fund and Bonus Schemes Act, 1948 or any scheme made thereunder, and the last section (section 40) repeals the Payment of Bonus Ordinance, 1965, but notwithstanding repeal, anything done or any action taken under the said Ordinance is to be deemed to have been done or taken under the Act as if the Act had commenced on the 29th May, 1965 when the Ordinance was promulgated.

The payment of bonus is now legislatively recognised and the Full Bench Formula is not only altered but it is to be seen that payment of some bonus is compulsory and the payment in any year lies within two termini of minimum and maximum bonus established by the Act. The calculation of bonus becomes almost mechanical and therefore, disputes are less likely to take place. But the Act, although the result of a tripartite deliberation, has not satisfied the employers generally. They object to some of its provisions on various grounds and we shall now proceed to examine them.

The first attack is on the provision for minimum bonus in section 10 irrespective of profits. It is submitted that a concept of minimum bonus, unrelated to profits, makes the payment an accretion to wages and leads indirectly to the erosion of capital since such payment, if it does not come from profits, must come from reserves or capital. The provision is thus said to be a "fraud on the Constitution" or "a colourable exercise of power" conforming neither to the accepted concept of bonus, nor to the principles, on which minimum wages are fixed. Section 10 is also said to offend Article 14 inasmuch as it makes no difference between companies making profits and companies having losses whether marginal or heavy. It is said that the fixation of the minimum bonus irrespective of considerations such as the kind of wages and dearness allowance prevailing in an establishment profit or loss in its business; and whether bonus is integrated with wages or not, creates inequality. It is pointed out that while bonus was formerly calculated on basic wage only and took no note of dearness allowance, the Act by defining "wage or salary" to include dearness allowance has increased the quantum of bonus payable. Even the 5 years' exemption to new establishments is criticised as discriminatory. Section 10 is said to enable deprivation of the property of the employers with a view to paying it to the workmen. The contending parties could not attack the Act under Article 19 in view of the Emergency but did not also give up the point although corporation not being citizens, have been

held by this Court to be not entitled to invoke the provisions of that article. In our judgment none of the arguments against section 10 can be accepted.

No doubt this Court allowed claim to bonus only if there was profit but that was not because any universally accepted recondite theory lay at the root. The Bonus Commission points out in its report that there were bonus pacts under which bonus equal to 15 days wages' irrespective of profits was payable and a maximum limit was also provided. The principle of set on and set off was also a part of these pacts. In fact, the desire to fix a maximum limit for bonus must inevitably lead to the fixation of a minimum limit also. The workmen were not slow to suggest that if minimum bonus is abolished the maximum limit must also go.

The employers rely upon *The New Maneck Chowk Spinning and Weaving Co., Ltd. Ahmedabad and others v. The Textile Labour Association, Ahmedabad*¹, in which this Court rejected the fixation by the Tribunal of minimum bonus for a year beyond the pact period although this was done in the interest of industrial peace. This case is of no value because the question here is one of the power of the Parliament and not of the power of the Tribunal. The powers of Parliament to fix minimum bonus cannot be questioned because it flows from jurisdiction over industrial and labour disputes, welfare of labour including conditions of work and wages. The legislation is therefore neither a fraud on the Constitution nor a colourable exercise of power. Under any of these powers, or all of them viewed together, the fixation of minimum bonus is legal and if these topics of legislation were found to be insufficient the residuary power of Parliament must lend validity to the enactment.

The validity of arguments about the integration of dearness allowance with wage to determine the quantum of bonus depends on how wages can be viewed today. Labour considers dearness allowance to be as fundamental as wage and, in fact, we have heard repeated pleas for the merger of dearness allowance in minimum wage. In our opinion, dearness allowance must obviously stay on till at least the need-based wage is reached. The gap between the actual wage and the need-based tends to widen as time passes unless the wage and/or dearness allowance are revised to obtain significant neutralization of the cost of living at any given moment of time. It may be, that in some industries dearness allowance does, to an appreciable extent neutralize the cost of living but such companies would hardly be required to pay minimum bonus for their profits would justify a higher bonus. Again, loss can only be established after the prior charges or some of them are deducted. The charges of minimum bonus is only 4 per cent. of the wage bill, i.e., equal to 15 days' wages and cannot be said to be heavy. Further, the provision for set off keeps the matter in suspense for at least four years during which the affairs of the company are likely to improve. Taking the provision for minimum bonus with the provision for set off it can hardly be said that the section is so exorbitant that it amounts to deprivation of the property of the employers with a view to giving it to the workmen. The provision makes payment of minimum bonus range next to payment of wages and dearness allowance and to rank in priority over any of the prior charges, deductible in favour of employers.

Comparison of minimum bonus with the Land Tax Act considered in *Kumthath Thathummi Moopil Nair v. The State of Kerala and another*², which imposed a flat rate of tax on all lands irrespective of their productivity, is not valid. The observations in that case, wide as they may appear, must not be extended by analogical application to a case of minimum bonus which is intended to promote industrial peace and to be a first step towards the goal of need-based wage. Even if the payment is viewed as a compulsory payment of wage the power to impose it as part of minimum wage is not lacking. It must not be forgotten that the fixation of minimum wage was also criticised along the same lines but was held justified. The differentials, the paying capacity of establishments or absence of profit made no difference. This was decided over and over again by this Court. See *Edward Mills Co., Ltd.*,

*Beawar v. State of Ajmer*¹, *Vijaya Cotton Mills Ltd. v. State of Ajmer*², *Express Newspapers (P.) Ltd. and another v. Union of India and others*,³ and *U. Unichoyi and others v. State of Kerala*.⁴

It has been said before that every uniform legislation can be made to appear ridiculous by citing a few examples and comparing them and this statement will bear repetition in the context of discrimination said to rise from section 10. Even under the Minimum Wages Act a prosperous establishment could be shown to be placed on the same footing as another establishment not so prosperous, but this Court did not strike down the Minimum Wages Act on that ground. In our judgment the provision for payment of 15 days' wages to workmen as bonus irrespective of profits is a measure well-designed to keep industrial peace and to make way for the need-based wage which the Tripartite Conference emphasised. Some unequal treatment can always be made to appear when laws apply uniformly. Two establishments cannot be so alike as the hypothetical examples taken before us suggested. Differences must exist but that does not prevent the making of uniform laws for them provided the law made has a rational relation to the object sought to be achieved and the inequality is trivial and hypothetical. Classification can only be insisted upon when it is possible to classify and a power to classify need not always be exercised when classification is not reasonably possible. In our judgment section 10 does not lead to such inequality as may be called discrimination.

It is next contended that section 32 creates inequality because it excludes 11 kinds of establishments from the operation of the Act. At first sight a provision calculated to exclude a few selected establishments from an otherwise uniform law must savour of discrimination but it must be borne in mind that there are establishments and certain classes of establishments cannot, with any practical advantage or without fear of harm, be classified with others. Nor is their exclusion from the general body of establishments necessarily discriminatory. In other words, a question of discrimination can only be decided when the circumstances of each exempted establishment is properly weighed and considered. It is only then that the fundamental differences can be noticed. Of the establishments mentioned in section 32 none was present before us for the simple reason that none was made a party. Nor was any special argument addressed in respect of any particular class. It is, therefore, improper for us to say whether there is any rational classification in section 32 or not. We accordingly do not express any opinion on this section.

Similarly section 36, which gives further power to the Central Government to exempt in the public interest an establishment or class of establishments for some period subject to such condition as the Central Government might deem necessary to impose, does not *per se* augur discrimination. There may be special cases which may require immediate relief and but for such a provision there would be no means of affording the relief. The existence of such a provision is not bad because it merely gives a power. But the exercise of the power must, of course, bear the scrutiny of Article 14. As no abuse of power is suggested, we cannot say that the section is by reason of a possibility of abuse discriminatory. The section cannot lightly be described as a piece of delegated legislation.

Section 37 gives power to the Central Government to make orders not inconsistent with the purposes of the Act as may be necessary or expedient for the removal of any difficulty or doubt and the order is made final. This provision is characterised as delegation of legislative power. There is some misunderstanding as to the function of such a provision which is to be found in several statutes. If a list were drawn up it will fill many pages but for example the following may be seen : section 14 of the Central Regulation 1962, (VII of 1962), section 128 of the States Reorganisation Act, 1956, section 33-A of the Business Profits Act of 1947, section 6 of the Taxation

1. (1955) S.C.J. 42 : (1955) 1 M.L.J. (S.C.) 1 : (1955) 1 S.C.R. 735 : A.I.R. 1955 S.C. 25.

2. (1955) S.C.J. 51 : (1955) 1 M.L.J. (S.C.) 10 : (1955) 1 S.C.R. 752 : A.I.R. 1955 S.C. 33.

3. (1958) S.C.J. 1113 : (1959) S.C.R. 12 : A.I.R. 1958 S.C. 578.

4. (1962) 1 S.C.R. 946 : A.I.R. 1962 S.C. 12.

Laws Act of 1949, section 7 of the Taxation Laws Extension (to Tehri Garhwal) Order, Taxation of Laws (Merged States) (Removal of Difficulties) Order, 1949 and Article 392 of the Constitution. As a legislative practice this is not new and the fact that one provision is in the Constitution and in some other the order has to be laid on the table of Parliament, makes no difference. The Constituent Assembly gave the power to Government but in this respect as in respect of powers of amendment, Parliament can do so again today. Nor have we got an Act about statutory orders such as in England. Much action under the Organisation of States Acts was taken under section 128 and the rest of Part XI of the Act. That section is in identical words. On this argument all the orders issued under these provisions must be treated as void. None has questioned any action so far.

The functions so exercised are not legislative functions at all but are intended to advance the purpose which the Legislature has in mind. The power to pass an order of this character cannot be used to add to or deduct from that which the Act provides. The order only makes smooth the working of the Act particularly in its initial stages. This power is given to the Central Government so that litigation may not ensue as the policy of Act is to avoid litigation. The rejection of such a provision is only possible if we begin with a concept of trinity of powers with the Legislature performing delegated power on behalf of the people, as is sometimes held in the United States. The rejection there takes place by the application of the maxim *delegatus non potest delegare*. This doctrine, it has been accepted on all hands was originated by the glossators and got introduced into English Law by a misreading of Bracton as a doctrine of agency and was applied by Coke in decisions to prevent the exercise of judicial power by another agency and later received its present form in the United States. The question is not one of a delegate making a sub-delegation but of the sovereignty of the Parliament. Parliament has not attempted to set up another Legislature. It has stated all that it wished on the subject of bonus in the Act. Apprehending, however, that in the application of the new Act doubts and difficulties might arise and not leaving their solution to the Courts with the attendant delays and expense, Parliament has chosen to give power to the Central Government to remove doubts and difficulties by a suitable order. The order, of course, would be passed with the four corners of the parliamentary legislation and would only apply the Act to concrete cases as the Courts do when they consider the application of an Act. The order of the Central Government is made final for the reason that it is hardly practical to give power to the Central Government and yet to leave the matter to be litigated further. The fact that in the Government of India Act, 1935 and in the Constitution such power was and is contemplated and it has been conferred in diverse Acts without a challenge before, shows amply that the argument that the section amounts to conferral of legislative powers on the Central Government is erroneous. All other cognate provisions have never been challenged on the ground that they amount to delegation of legislative power. We accordingly hold section 37 to be validly enacted.

It remains to consider the validity of sections 33 and 34. They are in a sense inter-related. The sections need not be quoted as we are concerned only with their scheme. These sections determine how the provisions of the Act are to apply in relation to establishments which differ in certain respects. For this purpose the Act provides for two dates for its own commencement. Under section 1 (4) the provisions of the Act are to have effect from an accounting year commencing on any day in 1964 and in respect of every subsequent accounting year. But by sections 33 and 34 the provisions are made applicable with some modifications in respect of accounting years earlier than the first accounting year mentioned in section 1 (4). To achieve this result sub-section (1) of section 34 provides that the provisions of the Act (as modified by section 34) shall apply, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in the terms of any award, agreement, settlement or contract of service made before the 29th May, 1965.

The Act then takes note of establishments which did not pay bonus in an accounting year earlier than the one mentioned in section 1 (4), establishments which either paid bonus in an earlier accounting year with or without a dispute but no dispute was pending on 29th May, 1965, and establishments in which a dispute was pending on 29th May, 1965 in regard to bonus in respect of a year not earlier than the accounting year ending on any day in 1962 although no such dispute may be pending for subsequent accounting years. In respect of establishments for which the Act is made retrospective beyond what is laid down in section 1 (4) bonus is to be calculated in the manner laid down in section 34 (2). Those establishments, which come under the Act for the first time as laid down in section 1 (4), are to be governed by the Act without the modifications envisaged by sections 33 and 34. These are establishments without a prior history of bonus payment. Establishments with a history of bonus payment come under sections 33 and 34. They are divided into two categories. Establishments in which a dispute was pending on the date of the passing of the Ordinance in regard to bonus relating to an accounting year not earlier than the accounting year ending on any day in the year 1962 are in one class and those in which no such dispute was pending are in another class. The *Explanation* to section 33 determines when dispute is to be deemed to be pending. In either of these two cases bonus is payable according to the provisions of the Act but as specially laid down in sub-section (2) of section 34. The Bonus Commission met for the first time on 4th January, 1962 and the Ordinance came into force on 29th May, 1965. These two dates determine the class of establishments to which the special provisions of sections 33 and 34 are made applicable.

The scheme may be summarized thus. The Act applies to all establishments from the accounting year commencing on any day in the year 1964 and in respect of any subsequent year. Establishments having no prior history of bonus payment are governed by the provisions of the Act without the modifications contained in sections 33 and 34. In respect of establishments with a prior history we have two classes : establishments in which a dispute was pending on 29th May, 1965 in respect of an accounting year not earlier than the accounting year ending in the year 1962 and those in which no such dispute was pending. The intention is to bring such cases under the Act but with some modifications. If there was a dispute pending in respect of an accounting year not earlier than an accounting year ending in the year 1962, the dispute is to be resolved as laid down in the Act with the special modifications made by section 34 notwithstanding that there was no dispute in subsequent years and the bonus for the subsequent years is also to be calculated in accordance with the Act so modified. In respect of establishments which had a history of payment but no dispute was pending on 29th May, 1965 the provisions of section 34 (2) apply a special ratio between the allocable surplus and gross profits for the determination of the quantum of the amount available for payment of bonus. In this way three distinct classes are created which may be summarized still further thus :

(a) establishments without a history of prior bonus payment. To these section 1 (4) applies ;

(b) establishments having a prior history of bonus payment with a dispute pending in respect of an accounting year not earlier than the accounting year ending in the year 1962. To these establishments the provisions of the Bonus Act (as modified by section 34 (2)), apply, not only for the accounting year in respect of which the dispute was pending but also for subsequent accounting years ;

(c) establishments with a prior history of bonus payment without a dispute such as is mentioned in (b) above. To these the provisions of the Bonus Act apply as modified in section 34 (2).

Section 34 (2) takes note of the quantum of bonus paid by establishments in a base year. This base year is different in the case of establishments which come under section 33 and establishments which do not so come. In respect of establishments falling within section 33 the base year means an accounting year immediately

preceding the accounting year to which the dispute relates and in the case of establishments which do not fall within section 33 it means a period of 12 months immediately preceding the accounting year in respect of which the Act becomes applicable to the establishments. The second sub-section of section 34 preserves the same level of payments in the case of establishments which had in the past paid bonus at a higher rate than would be paid under the formula laid down by the Act. For this purpose the ratio between the bonus and the gross profits in the base year determines the proportion which allocable surplus must have to the gross profits of the account year. Gross profits are defined to mean gross profits reduced by direct taxes only. The payment is, however, subject to the maximum limit and the principle of set on. In this way the level of payment of bonus is maintained to what had been paid in the past as a result of agreement or award.

The question is whether this classification is so arbitrary and creates such differences that it cannot be reasonably related to the object which the Bonus Act intends to achieve, namely, the settlement of all bonus disputes in future and to lay down a uniform formula which is considered reasonable both for the workmen as well as the employers so long as the Act remains in force.

The objections to sections 33 and 34 may now be noticed. These sections are criticised on many grounds. Firstly, it is said that the Act creates inequality inasmuch as the formula under the Act is made applicable to cases pending for the application of the Full Bench Formula in respect of accounting years from 1962 onwards but leaves the establishments in which there was no dispute to be governed by the Full Bench Formula. This, it is submitted, is onerous to the establishments in which a dispute was pending. The onerous nature, it is submitted arises from the fact that payment of minimum bonus even if there is a loss is compulsory, new categories of workmen have become entitled to bonus, "salary or wages" is made equal to wages plus dearness allowance and the employers lose the advantage of deductions on account of rehabilitation. A further criticism is that not only the year of dispute but all intervening years are brought under the Act even though there may be no dispute in those years.

The object of the Bonus Act is to introduce a new uniform formula for calculation of bonus with limits of maximum and minimum and a principle of set on and set off to smoothen inequalities of payment over a number of years. One difficulty in the way of uniform law was the pendency of disputes at the time the Ordinance was promulgated. This would, of course, be the case whenever any law was introduced if a dispute was pending in respect of a prior year. There were two alternatives open. One was to leave the disputes to be decided by the Tribunals under the Full Bench Formula and the other was to apply the Act to the pending cases so that all decisions would be uniform and almost mechanical. If pending cases were to be treated as a class, special provision was required to deal with them. The Act chose to do away with the Full Bench Formula from 1962. If it had been applied and no dispute was pending at all the matter was left there. For other cases there was a clear need for classification and classification was thus resorted to. Pending cases were brought under the Act. The Act, of course, could not be applied without suitable modifications to remove hardships. Section 34, therefore, provided that the Act would apply to all cases as modified in the second sub-section of section 34. That sub-section applied only to establishments in which there was a prior history of bonus payment and attempted to harmonize the application of the law to establishments in which disputes were pending and those in which there was no dispute. We are thus required to see the provisions of that sub-section before we can deal with the criticism against section 33.

Section 34 deals with two matters. It deals with establishments in which a dispute, as laid down in section 33, was pending and also with old establishments in which there was payment of bonus in the past but no dispute was pending when the Ordinance was promulgated. It applies the Act to both sets of cases. It lays down a simple condition that the total bonus for any accounting year should correspond to

the level of total bonus paid in a base year and for this purpose the allocable surplus in an accounting year dealt with under the Act must bear the same proportion to gross profits as the total bonus paid in the base year did to the gross profits of the base year, subject however to the maximum limit and the principle of set on. The base year was so defined that it would be a year in which there would be no dispute. In those cases in which a dispute was pending on 29th May, 1965, it meant an accounting year immediately preceding the year of dispute and in other cases a period of 12 months immediately preceding the period of accounting year in respect of which the Act became applicable. Gross profits were differently defined for the purpose of the application of the sub-section and meant gross profits as reduced by direct taxes payable in the year. It is obvious that this definition was evolved to avoid a clash between the Full Bench Formula and the formula under the Act. The provisions of section 34 (2) were specially enacted so that there might not be divergence in the payment of bonus over a number of years and to maintain the level of payment, as had existed in the past. In this way, these classes of cases were contemplated and we shall describe them more fully now.

In the first class were put all establishments which had no history of bonus payment. They came directly under the formula of the Act from the accounting year 1964. All such establishments were dealt with uniformly and there was no discrimination or inequality among them except what was said to arise from section 10. That alleged inequality does not offend Article 14 as we have already indicated above.

In the second class were put cases in which a dispute was pending on 29th May, 1965 (the date of the promulgation of the Ordinance). The dispute of which the Act took note was a dispute pending before Government or before a Tribunal or Authority under the Industrial law. No note was taken of cases pending before the High Courts and the Supreme Court because the jurisdiction of the High Courts and the Supreme Court is either supervisory or appellate and the intention was to cover cases in which no decisions of the authorities appointed under the law relating to industrial disputes was yet made. Disputes prior to 1962 were not taken note of because a date line had to be fixed and 1962 was the rational date to fix because the Bonus Commission began its deliberations in that year. Selection of this date is said to be arbitrary. In several statutes a date is generally selected to demarcate pending cases and the selection of the date has never been challenged successfully if there is some rational ground for its selection. If the resolution of the dispute by the instrumentality of the Act was contemplated, the Act had also to say which dispute would be so resolved and the only rational date to select was the date on which the Ordinance was promulgated. Thus the pendency of disputes with reference to the Ordinance and reopening of accounting years up to the year in which the Bonus Commission began its deliberation was logical and not arbitrary. The provision with regard to the reopening of the intervening accounts year for refixation of bonus was also logical. If the dispute regarding 1962 or a later year was decided by the application of the Act it was imperative to reconsider the subsequent years even though there was no dispute in those years. The process of the Act is an integrated one and by the principle of set on and set off four accounting years are involved to avoid extraordinary results. It is said that two establishments equally situated are likely to be differently treated depending on the fortuitous circumstance of the existence of a dispute but is not this assumption an imaginary one? The fact that in one there is a dispute and in the other there is not, clearly distinguishes the two establishments. We have explained in connection with section 10 why we do not consider such comparison of any value and the same reasoning applies here. The distinguishing feature of the pendency of the dispute on the date of the promulgation of the Ordinance clearly demarcates a distinct class of cases and the classification made by the Act is a rational one. No doubt the liability for bonus under the Act may be more in some cases but it is likely to be less in others. The Act does not make any difference in treatment within the class it deals with. All establishments in which disputes were pending are treated alike. They are brought under the Act in the same manner without any discrimination. If they represent a class, the whole of the class

is treated in the same way. Section 33 by providing uniformly for all pending cases, without any discrimination between them, has established a rational classification. Section 33, therefore, cannot be said to be invalid by reason of any inequality.

Section 34 (2) which is next criticised because it sacrifices all principles which this Court had established in the past and fixes a ratio for all time to come is also not invalid. The Act was passed to make for greater certainty, for improving relations between the employers and the workmen and for the avoidance of disputes. It must not be forgotten that in many establishments the payment of bonus in the past was the result of collective bargaining and the advantage which labour had so achieved was not likely to be given up readily. Any legislation to be successful had to preserve, as far as possible, what labour considered to be its right in a particular establishment. For this purpose a base year for comparison had to be established. Section 34 (2), therefore, laid down that the total bonus paid in any year should bear the same proportion to gross profits in the accounting year as did the bonus to the gross profits in the base year. Gross profit was, however, defined to mean gross profit minus direct taxes only. This obviously gave an advantage to the employers because the proportion was bound to be less if depreciation and return on capital, etc. were ignored. By establishing a base year and by insisting that the same proportion should be maintained in the payment of bonus the establishments knew with certainty what their liabilities in respect of bonus would be in the future years. The establishment of the maximum and minimum limits further controlled payments. The ratio so established is only applicable if there is allocable surplus and the total payment of bonus cannot, in any event, exceed 20 per cent. which it might well have done if there was no limit. In other words, between the maximum and the minimum the same ratio of payment is to be maintained from year to year and the payment will be more or less according as the profits from which the allocable-surplus is to be calculated are greater or smaller. If extraordinary circumstances appear set on and set off will make them less onerous for the employers or employees. The existence of this rigid ratio, which applies to all establishments which come under section 34 (2) does not, in our opinion, create any inequality.

It is, however, submitted that the Act has ignored the definition of "workmen" in the Industrial Disputes Act and by allowing bonus to employees drawing salary or wage up to Rs. 1,600 per month has increased the burden of the employers. It is also argued that this creates inequality between those establishments which come under section 33 and those which paid bonus under the Full Bench Formula. This argument ignores several matters. The total bonus now cannot exceed 20 per cent. of the total wage bill, i.e., less than $2\frac{1}{2}$ months' total wages and dearness allowance. The demand for bonus in some establishments was much more and it is hardly correct to say that bonus payable under sections 33 and 34 (2) will always, be more than that payable under the Full Bench Formula. The controlling factors are the establishments of the ratio, the fixation of a minimum limit and the principle of set off. As a result of the operation for these factors, the net amount cannot be as disadvantageous to the employers as was represented to us. The increase in the number of persons entitled to receive bonus, therefore, will not be of much significance. The number of such employees cannot be very large and in any event no employee will get bonus at a higher rate than a person drawing wage or salary of Rs. 750 per month. We are not in agreement with this argument.

The question thus is one of the power of Parliament to enact a law relating to bonus. Once the power to make the law is found, then the law so made cannot be struck down unless it offends a fundamental right. As the Bonus Act makes valid classifications and everyone in a class is equally treated, it is impossible to say that there is inequality. The arguments have taken examples of what are called "similarly situated establishments" in each class to show unequal treatment when it is obvious that the similarity is imaginary and even similarly situated establishment (if any there be) in different classes cannot be compared. The arguments have not faced the question of classification but have been extremely ambiguous. For example it was

even suggested that the ratio between profits and allocable surplus in a base year might be infinity if there was no profit, overlooking the simple fact that existence of profit is a condition precedent to the finding of the ratio. On this kind of reasoning the provisions of section 10 were also attacked which we have explained are not affected.

Our brethren have struck down sections 33, 34 and 37, but have upheld the other sections. We are, however, of opinion that if Parliament can legally constitutionally, and validly order payment of bonus according to its formula, fix minimum bonus without profits, fix a ceiling in spite of high profits, evolve a principle of set on and set off and make disobedience subject to a penalty, there is no reason why it cannot order decision of pending cases *treated as a class* according to the new formula and open up the intervening years of account for reconsideration. The power in section 33 is of the same character as the other and no special competence is required, of course in doing this it should treat alike all establishments in which there is a pending dispute. This Parliament has done. Similarly, by section 34 Parliament orders that a certain proportion between profits and allocable surplus shall be maintained. This exercise of the power is of the same character as the prescription that bonus shall be paid in this and this manner and no other. If the action is legal, so is this, provided there is no discrimination. There is none in this class either. The power to remove difficulties reserved to Government is in hundreds of statutes. All Land Reform Acts, State Reorganisation Acts, Industrial Disputes Acts, Encumbered Estates Acts, many taxation laws and such widely differing statutes as University Acts and Election Acts have it and the power of exemption is always included but is seldom abused. We have, therefore, respectfully dissented from their view.

In our judgment, the matter requires to be looked at from the point of view of avoidance of industrial disputes and the imposition of a uniform formula for all establishments. The existence of different kinds of establishments as set out above, has made it necessary to classify and to make special rules for determination of bonus. By the special rules contained in sections 33 and 34 the older establishments are treated as equally as possible, except where the pendency of cases has necessitated different rules to make the Act applicable to them. Uniformity in each class has been achieved and there is no discrimination. As the power to frame a new bonus formula cannot be gainsaid, the power to classify cannot also be denied. The Act further confers power to exempt and remove doubts and difficulties (which provisions are unfortunately criticized) and they can be invoked where in spite of so much care there is hardship in a special case.

In our judgment the Bonus Act is validly enacted and this appeal must fail. We would dismiss the appeal and the writ petitions with costs.

By THE COURT:—In accordance with the opinion of the majority, the appeal is allowed and the order of the Industrial Tribunal set aside. The writ petitions are allowed in part and sections 33, 34 (2) and 37 are declared *ultra vires*. There will be no order as to costs in all these proceedings.

V.K.

Appeal allowed;

Writ petitions allowed in part.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—A. K. SARKAR, RAGHUBAR DAYAL AND V. RAMASWAMI, JJ.
 A.K. Gupta & Sons Ltd. .. Appellants*

v.

The Damodhar Valley Corporation

.. Respondent.

Civil Procedure Code (V of 1908), Order 6, rule 17—Suit for mere declaration held to be unsustainable under proviso to section 42, Specific Relief Act (I of 1877)—Amendment including prayer for consequential relief—If can be allowed after it is time barred.

A contract for work provided for proportionate increase in rate over the prevailing labour rate per cooly. Subsequent to the making of the contract there was an increase in the labour rate per cooly by 20 per cent. The appellant claimed that under the clause it was entitled to the whole amount of the increase while the respondent contended that it was entitled to a part of it only. The appellant filed a suit only claiming a declaration that on a proper interpretation of the clause it was entitled to an increase of 20 per cent. over the tendered rates as the sole difference between the parties was about the interpretation. The plaint stated that work had been done under the contract and that the value of the suit for purpose of jurisdiction was Rs. 65,000 but as it was a suit for declaration only Court-fee on that basis had been paid. The trial Court decreed the suit but on appeal the High Court decided that because of the terms of the proviso to section 42 of the Specific Relief Act (1877) the suit was not maintainable and the suit was dismissed. The amendment of the plaint by adding the extra relief. "That a decree for Rs. 65,000 or such other amount which may be found due on proper account being taken may be passed in favour of the plaintiff against the defendant" sought by the appellant having been refused by the High Court as the money claim was barred by that time on appeal to the Supreme Court.

Held (by majority) the general rule no doubt, is that a party is not allowed by amendment to set up a new case or a new cause of action particularly when a suit on the new cause of action is barred. But where the amendment does not constitute the addition of a new cause of action or raise a different case but amounts to no more than a different or additional approach to the same facts, the amendment will be allowed even after the expiry of the statutory period of limitation. No amendment will be allowed to introduce a new set of ideas to the prejudice of any right acquired by any party by lapse of time. The instant case was one in which the claim for money was in substance in the plaint from the beginning though it had not formally been made and it is pre-eminently a case for allowing the amendment. The amendment sought is necessary for a decision of the real dispute between the parties which is, what are their rights under the contract? That dispute was clearly involved in the plaint as originally framed. All the necessary basic facts had been stated. Only through a misconception a relief which could be asked on the facts had not been asked.

Per Raghubar Dayal, J.—An amendment which would enable a plaintiff to make a claim which has become time-barred is as a rule to be refused and the Court would exercise its special power to allow such amendment only when there be special circumstances in the case. Such special circumstances as gathered from the cases where amendment was allowed, can be only when the amended claim was at least intended to be made by the plaintiff who had given in the plaint all the necessary facts to establish the claim but had due to clumsy drafting not been able to express himself clearly in the plaint and to couch his relief in the proper legal form.

In the instant case the plaint nowhere indicates the amount of work done under each category and unless the plaintiff sets out the amount of work done he cannot certainly make out any claim for payment to him. The amendment sought would necessitate practically a *de novo* trial on the question as to what amount the plaintiff is entitled from the defendant on account of the work done. The amended claim cannot be decreed on the facts on the record. The cause of action is different and the amendment cannot be allowed.

Appeal from the Judgment and Decree dated the 19th January, 1961 of the Patna High Court in Appeal from Original Decree No. 253 of 1955.

Niren De, Additional Solicitor-General of India (*D. N. Mukherjee*, Advocate, with him), for Appellants.

Kanhaiyaji and S. P. Varma, Advocates, for Respondent.

The Court delivered the following Judgments :

Sarkar, J. (for himself and *Ramaswami J.*):—The question raised in this appeal is whether the High Court was in error in refusing permission to the appellant to amend its plaint. We think it was.

The appellant had done work for the respondent under a contract which only specified the rates for different categories of work. The contract contained the following clause : "This quotation is based on prevailing labour rate of Rs. 1-4-0 per cooly but if there is increase of labour rate of more than 10 per cent. in any particular month, the proportionate increase in rate will be charged". Subsequent to the making of the contract there was an increase in the labour rate per cooly by 20 per cent. The appellant claimed that under the clause it was entitled to the whole amount of the increase while the respondent contended that it was entitled to a part of it only. This was the only dispute between the parties in respect of the contract. There was no other dispute either concerning the quantity or quality of the work done or otherwise howsoever.

The appellant filed a suit against the respondent only claiming a declaration that on a proper interpretation of the clause it was entitled to an enhancement of 20 per cent. over the tendered rates as the sole difference between the parties was about the interpretation. The plaint stated that work had been done under the contract and that the value of the suit for purposes of jurisdiction was Rs. 65,000, but as it was a suit for a declaration only Court-fees on that basis had been paid. The respondent in its written statement challenged the appellant's interpretation of the clause but did not dispute any material fact or that the only dispute was about the interpretation. The written statement concluded by saying that the respondent "was ever ready and willing and is still ready and willing to pay the legitimate due to the plaintiff."

Before the learned trial Judge several issues were raised but it is necessary to mention only two. One issue was as to the maintainability of the suit in the form in which it had been framed and the other issue was as to the proper interpretation of the clause. The first of these issues was not pressed at the hearing. The other issue having been decided by the trial Court in favour of the appellant, the suit was decreed. The other issues which had been raised, had also not been pressed.

The respondent then went up in appeal to the High Court at Patna. There the issue as to the maintainability of the suit was resuscitated and pressed and it was decided in the respondent's favour because of the terms of the proviso to section 42 of the Specific Relief Act, 1877. The correctness of this view is not challenged in this Court. In the result the High Court dismissed the suit.

Now, the appellant had in view of the High Court's decision as to the maintainability of the suit, sought its leave to amend the plaint by adding an extra relief in the following words : "That a decree for Rs. 65,000 or such other amount which may be found due on proper account being taken may be passed in favour of the plaintiff against the defendant". The amendment having been refused the present appeal has been preferred.

It is not in dispute that at the date of the application for amendment, a suit for a money claim under the contract was barred. The general rule, no doubt, is that a party is not allowed by amendment to set up a new case or a new cause of action particularly when a suit on the new case or cause of action is barred : *Weldon v. Neale*¹. But it is also well recognised that where the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts to no more than a different or additional approach to the same facts, the

amendment will be allowed even after the expiry of the statutory period of limitation : see *Charan Das v. Amir Khan*¹; and *L. J. Leach & Company, Ltd. v. Jardine Skinner & Co.*².

The principal reasons that have led to the rule last mentioned are, first, that the object of Courts and rules of procedure is to decide the rights of the parties and not to punish them for their mistakes (*Cropper v. Smith*³) and secondly, that a party is strictly not entitled to rely on the statute of limitation when what is sought to be brought in by the amendment can be said in substance to be already in the pleading sought to be amended (*Kisandas Rupchand v. Rachappa Vithoba*⁴, approved in *Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil*⁵).

The expression "cause of action" in the present context does not mean "every fact which it is material to be proved to entitle the plaintiff to succeed" as was said in *Cooke v. Gill*⁶, in a different context, for if it were so, no material fact could ever be amended or added and, of course, no one would want to change or add an immaterial allegation by amendment. That expression for the present purpose only means, a new claim made on a new basis constituted by new facts. Such a view was taken in *Robinson v. Unicos Property Corporation, Ltd.*⁷ and it seems to us to be the only possible view to take. Any other view would make the rule futile. The words "new case" have been understood to mean "new set of ideas": *Dorman v. J. W. Ellis & Co., Ltd.*⁸. This also seems to us to be a reasonable view to take. No amendment will be allowed to introduce a new set of ideas to the prejudice of any right acquired by any party by lapse of time.

Now, how does the present case stand on these principles? Does the amendment introduce a new cause of action or a new case? We do not think it does. The suit was on the contract. It sought the interpretation of a clause in the contract only for a decision of the rights of the parties under it and for another purpose. It was the contract which formed the cause of action on which the suit was based. The amendment seeks to introduce a claim based on the same cause of action, that is, the same contract. It introduces no new case or facts. Indeed the facts on which the money claim sought to be added is based are not in dispute. Even the amount of the claim now sought to be made by amendment, was mentioned in the plaint in stating the valuation of the suit for the purpose of jurisdiction. The respondent had notice of it. It is quite clear that the interpretation of the clause was sought only for quantifying the money claim. In the written statement the respondent specifically expressed its willingness to pay the appellant's legitimate dues which could only mean such amount as might be due according to the rates applicable on a proper interpretation of the clause. The respondent was fully aware that the ultimate object of the appellant in filing the suit was to obtain the payment of that amount. It was equally aware that the amount had not been specifically claimed in the suit because the respondent had led the appellant to believe that it would pay whatever the Court legitimately found to be due. It in fact said so in the written statement. If there was any case where the respondent was not entitled to the benefit of the law of limitation, the present is that one. The respondent cannot legitimately claim that the amendment will prejudicially affect his right under that law for really he had no such right. It is a case in which the claim for money was in substance in the plaint from the beginning though it had not formally been made.

This, therefore, seems to us to be pre-eminently a case for allowing the amendment. The authorities also lead us to the same view. In *L. J. Leach & Co's case*² a suit for damages for conversion was by amendment allowed to be converted into a suit for damages for breach of contract after that claim had become barred, the necessary facts, as in the case in hand, being already in the plaint. In *Charan Das's case*¹, an amendment adding a claim for possession after a suit for such claim had

1. (1920) 39 M.L.J. 195 : L.R. 47 I.A. 255.

2. (1957) S.C.J. 313 : (1957) S.C.R. 438 : A.I.R. 1957 S.C. 357.

3. (1884) 26 Ch. D. 700, 710-1.

4. (1909) I.L.R. 33 Bom. 644, 651.

5. (1957) S.C.J. 371 : (1957) S.C.R. 595, 603 : A.I.R. 1957 S.C. 363.

6. (1873) L.R. 8 C.P. 107, 116.

7. (1962) 2 All E.R. 24.

8. (1962) 1 All E.R. 303.

become barred was allowed in a suit which originally had only claimed a declaration of a right to pre-empt. In the last-mentioned case, the plaintiff had in spite of warning at the earliest stage refused to make the amendment which he later sought and got. It was, therefore, a case where the plaintiff had initially deliberately refused to make a claim and an amendment being allowed later permitting that claim to be raised after it had become barred. It was in a sense a stronger case than the present one where the plaintiff had omitted to make the claim initially on a wrong notion and a wrong legal advice. Punishing of mistakes is, of course, not administration of justice.

It is true that the plaint does not set out the details of the work done. But there never was any dispute about them. Indeed the respondent had prepared a final bill of the appellant's dues for the work done under the contract and the appellant had accepted that bill as correct except on the question as to the proper rate chargeable under the clause. Strictly the details of the work done were not necessary in the plaint for it would be a waste of time of a Court to go into them, it not being unusual to direct an enquiry by a commissioner or a subordinate officer about such details when, as in the present case, the items of work done are innumerable. It would be enough in such cases to file the details before the authority making the enquiry. Besides, in *Pirgonda Hongonda Patil's case*¹, in a suit for a declaration of title, this Court permitted an amendment setting out the detailed facts on which the title was claimed after the suit had become time-barred. The absence of the details of the work does not furnish a legitimate ground for refusing the amendment.

It may be that as a result of the amendment, if the respondent chooses to raise a controversy about the work done, that is, about the quantity, quality and other things concerning it, which it had never raised so long, the matter will have to be gone into. That again would not justify a refusal of leave to amend. It could not mean any waste of time or money or any duplication of work. That investigation would now be made for the first time and nothing done so far would become futile. Such an enquiry was indeed directed in *L. J. Leach & Co.'s case*².

The amendment sought is necessary for a decision of the real dispute between the parties which is, what are their rights under the contract? That dispute was clearly involved in the plaint as originally framed. All the necessary basic facts had been stated. Only through a misconception a relief which could be asked on those facts had not been asked. It would not have been necessary to ask for it unless the defendant had at a late stage taken the point that the suit should fail without more in the absence of that relief. We find the present case indistinguishable from *Charan Das' case*³.

We would for these reasons allow the appeal. The case would go back to the High Court with a direction to it to allow the amendment sought and then to decide the correct interpretation of the disputed clause and thereafter, if the occasion arose, to ascertain the amount due by a proper enquiry to be made either by the High Court or by the trial Court as the High Court may think fit. The High Court may, if the appellant asks for it, also allow an amendment setting out the particulars making up the claim of Rs. 65,000 introduced by the amendment, that is, quantity, rate, etc., of the work done. The appellant will get the costs in this Court. The question of subsequent costs will be decided by the High Court. The judgment of the High Court in so far as it refused the amendment is set aside but the rest of that judgment will stand.

Raghubar Dayal, J.—This appeal, on certificate granted by the High Court of Patna is against the judgment and decree dismissing the appellant's suit for a declaration on the ground that the plaintiff had not asked for consequential relief. The High Court rejected the application presented to it for amendment of the plaint

1. (1957) S.C.J. 371 : (1957) S.C.R. 595, A.I.R. 1957 S.C. 357.

603 : A.I.R. 1957 S.C. 363.

2. (1957) S.C.J. 313 : (1957) S.C.R. 438 :

3. (1920) 39 M.L.J. 195 : L.R. 47 I.A. 255.

The question for determination is whether the High Court was right in rejecting the application for amendment.

The plaintiff sued for a declaration that it was entitled to enhancement of 20 per cent. over the tender rates for the different categories of excavation work as detailed in para. 13 of the plaint in connection with the work of excavation in foundation of the Tilaiya Dam at Katni, P.S. Koderma, in the district of Hazaribagh. Paragraphs 1 and 2 of the plaint read :

"1. That the plaintiff did excavation work of different categories as contractor in connection with the excavation in foundation of the Tilaiya Dam at Katni in the district of Hazaribagh, P.S. Koderma. The contractor's letter of 24th September, 1949 (Annexure A) eventually became the tender for such work.

2. Paragraph of the contractor's letter stated :—"This quotation is based on prevailing labour rate of Rs. 1-4-0 per cooly but if there is increase of labour rate of more than 10 per cent. in any particular month, the proportionate increase in rate will be charged."

Paragraphs 3 to 11 state facts which indicate that the plaintiff had asked for the increase of the labour rate per cooly by 20 per cent. and that the enhanced rates approved by the Corporation-defendant were not accepted by the plaintiff. Paragraph 12 states that the plaintiff asked for payment under protest to which the defendant was not agreeable. Paragraph 13 mentions the enhanced rates to which the plaintiff considers himself entitled according to the proper interpretation of clause 17 of the tender. Paragraph 14 of the plaint reads :

"As the difference between the parties is about the interpretation of clause 17 of the letter of the contractor dated 24th September, 1949, the plaintiff is advised to file the suit in the declaratory form."

The plaintiff reserves the right under Order 2, rule 2 of the Code of Civil Procedure to omit to sue in respect of amount that may be found due upon the interpretation placed by the plaintiff upon the said clause 17 which interpretation it is submitted is the proper interpretation. The plaintiff reserves the right to sue later on for the amount found due to him."

Paragraph 15 states that the cause of action arose on 6th December, 1951, when the Corporation refused to allow the increase of 20 per cent. Paragraph 16 gives the value of the suit for the purpose of jurisdiction to be Rs. 65,000 and said that Court-fees of Rs. 20-10-0 was paid as the suit was for declaration. Paragraph 17 said that the plaintiff claimed (i) leave under Order 2, rule 2, Civil Procedure Code ; and (ii) that it be declared that the plaintiff is entitled to enhancement of 20 per cent. over the rates for the different categories of excavation work as detailed in of the plaint in connection with the work of excavation in foundation of the Tilaiya Dam. The plaint contained 3 annexures.

Annexure A was the letter which ultimately constituted the tender. The schedule to the tender described the class and description of work to be executed, unit of calculation and the rate of payment. Annexure B was the letter from the plaintiff to the Executive Engineer dated 11th March, 1950, stating the difficulties in the performance of the contract. Annexure C was the letter from the Executive Engineer dated 15th 16th March, 1950, conveying the approval of an enhancement of 10 per cent. in the rate over the tendered rate for the excavation work from the date onward. Annexure D is the letter from the plaintiff to the Corporation dated 26th December, 1951, disputing the interpretation of the Corporation.

It is clear from the plaint and its enclosures that the dispute between the parties was about the rate to be paid for the different categories of work and that the plaintiff did not deliberately sue to recover the amount that might be found due upon the interpretation placed by the plaintiff upon the said clause 17.

Paragraph 13 of the written statement filed by the defendant stated that the defendant did not admit the later part of the statement in para. 14 of the plaint which related to the plaintiff's reserving his right to sue later for the amount found due at the enhanced rate. The defendant, *inter alia*, contested the suit on the ground that the suit was not maintainable in the form in which it had been framed. Paragraph 16 of the written statement stated that the Corporation was ever ready and willing and was still willing to pay the legitimate dues to the plaintiff.

Issue No. 2 of the issues framed in the case was : ' Is the suit maintainable in its present form ? ' The trial Court stated in its judgment :

" The defendant also pleaded that the plaintiff has no cause of action the suit is not maintainable in the present form and the Court-fees paid is insufficient. But these allegations were not pressed at the time of hearing. "

It accepted the contention for the plaintiff that it was entitled to over-all increase by 20 per cent. in accordance with clause 17 of the tender. It further said :

" No objection has been pressed as to the plaintiff's prayer regarding leave under Order 2, rule 2 Civil Procedure Code. That must therefore be allowed. "

It accordingly decreed the suit.

On appeal, the High Court accepted the respondent's contention that in view of the proviso to section 42 of the Specific Relief Act the suit for mere declaration was not maintainable and that the trial Court was not right in granting permission under rule 2 (3) of Order 2, Civil Procedure Code to the plaintiff to institute another suit for the amount to which the plaintiff would be entitled after the declarations sought for in the suit had been granted. The prayer for amending the plaint was rejected the money claimed had become time-barred long before the prayer was made during the arguments before the High Court and as there existed no special circumstances to justify the grant of the amendment against the interests of the defendant-respondent. The High Court therefore allowed the appeal and dismissed the suit. It however granted leave to appeal as the requirements of Article 133 (i) (a) of the Constitution were satisfied.

Learned Counsel for the appellant has contended that there exists such special circumstances in the case which would have justified, in the interests of justice, the grant of the application for amendment of the plaint and in the alternative, contended that the High Court should not have allowed the respondent to object to the maintainability of the suit on the basis of the proviso to section 42 of the Act and if the Court had allowed such an objection it should have, as a matter of course, allowed the application for amendment.

I propose to dispose of the second contention first. The contention about the maintainability of the suit was based on section 42 of the Act and had to be allowed. The Court could not make a declaration unless further relief had been prayed for. It was incumbent on the Court to comply with this requirement of law, even if not raised by the party, when it was clear that further relief could be claimed in the suit. Further, in this particular case it cannot be said that no objection had been raised on this ground by the respondent up to the stage of the appeal in the High Court. In paragraph 2 of the written statement, the respondent questioned the maintainability of the suit in the form in which it was instituted. Issue No. 2 was framed in that connection. The contention was not given up by the respondent. It was simply not pressed on his behalf, possibly, because if felt strong on the contention on the basis of which the declaration was sought. We therefore do not consider the High Court in error in allowing the respondent to raise the objection to the maintainability of the suit on account of the plaintiff not having asked for the further relief.

It does not however follow that the appellant must have been allowed, as a matter of course, to amend the plaint by adding a claim for recovery of the amount found due.

The various cases relied on in support of this contention are cases in which the fresh relief claimed by way of amendment was not affected by the law of limitation and the objection to the maintainability of the suit had not been taken at an early stage of the suit. Reference need not be made to all those cases except to the one reported as *Rukhmabai v. Lala Laxminarayan*¹, in which this Court observed :

1. (1960) S.C.J. 433 : (1960) 2 S.C.R. 253, 285 : A.I.R. 1960 S.C. 335.

"It is a well-settled rule of practice not to dismiss suits automatically but to allow the plaintiff to make necessary amendment if he seeks to do so."

Neither the question of limitation arose in that case nor did the Court consider it necessary for the plaintiff to have asked for consequential relief. The above observation cannot be taken to be a pronouncement in connection with amendments sought in the pleadings when they be with respect to claims which had become time-barred.

It is now well-settled that the Court has power to allow amendments in connection with claims which had become time-barred, if special circumstances exist and it be in the interest of justice. This is not disputed for the respondent. The real dispute between the parties is whether the circumstances of the case come within the principle laid down in the various cases. This necessarily leads to a consideration of the circumstances and the amendments sought in those cases.

Before referring to the cases, I may set out the provisions of the Code which empower the Court to allow amendment of pleading. Section 153 and Order 6, rule 17, deal with the matter.

Section 153 reads :

"The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding."

Rule 17 of Order 6 reads :

"The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

These indicate that the amendment should be in such manner as may be just and that, as a rule, all such amendments shall be made as be necessary for the purpose of determining the real questions in controversy between the parties. No amendment would be just if it so prejudices the interests of the other party for which that party cannot get any relief from the Court. The amendments which must be allowed can be those in the absence of which the Court may not be able to determine the real question in controversy between the parties. The real question in controversy must be gathered only from the plaint and to some extent from the allegations in the written statement. If the point to be decided as a result of the amendment is not covered by the controversy raised by the plaint and the written statement, the amendment is not to be allowed necessarily, for the simple reason that it is unnecessary for determining the real questions in controversy between the parties. The Court has to decide the suit instituted before it and with respect to the controversies raised in it. It follows that the amendments to be allowed relate to such matters which, due to bad drafting of the plaint, could not be clearly and precisely expressed, though the parties did really intend to have those matters determined by the Court. The object of the amendment of the pleadings is to clarify the pleadings for bringing into prominence the real controversy between the parties and not for helping a party by making such amendments which be beneficial to him in connection with some dispute between the parties, a dispute which has not been really taken to the Court for decision and which the parties did not really intend to be decided in that suit. This seems to me to be the real basis for an order of the Court in connection with such amendments sought by a party in its pleadings as would raise a claim which has become time-barred.

None of the cases referred to by the parties hold differently.

The cases which are to be considered in this connection are : *Kisandas Rupchand v. Rachappa Vithoba*¹ ; *Charan Das v. Amir Khan*² ; *L. J. Leach & Co., Ltd. v. Jardine Skinner & Co.*³ ; and *Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil*⁴. Reference

1. I.L.R. 33 Bom. 644.

2. 39 M.L.J. 195 : L.R. (1920) 47 I.A. 255.

3. (1957) S.C.J. 313 : (1957) S.C.R. 438 : A.I.R. 1957 S.C. 357.

4. (1957) S.C.J. 371 : (1957) S.C.R. 595 ;

A.I.R. 1957 S.C. 363.

to the *Kisandas Rupchand's case*¹ is necessary as some of the observations in that case were approved by this Court in *Patil's case*².

In the *Kisandas Rupchand's case*¹, the plaintiff sued for dissolution of partnership and accounts alleging that in pursuance of the partnership agreement they had delivered Rs. 4,001 worth of cloth to the defendants. The Court found that the alleged agreement was not a partnership agreement but evidenced the advance of a simple loan by the plaintiffs to the defendants. The trial Court held that the plaintiffs had really delivered cloth worth Rs. 4,001 to the defendants, but dismissed the suit as no decree for dissolution of partnership and for accounts could be given and the plaintiff had not asked to amend the plaint. In the first appellate Court the plaintiffs-appellants accepted the finding of the trial Court that no partnership was constituted by the agreement and prayed for leave to amend by adding a prayer for the recovery of Rs. 4,001. The appellate Court was of opinion that the plaintiffs had from the first intended to sue only for the recovery of money but had been misled by their pleader, allowed the amendment to be made and ultimately decreed the claim for Rs. 4,001. On the date of the amendment, it may be noted, most of the claim had become time-barred. In the Second Appeal, Batchelor, J., said at page 651:

"Falling back, then, upon the words of the rule, I cannot follow the argument that there would be any injustice to the appellants in allowing the amendment, for the only effect of it is to enforce their liability for a debt which was claimed, disputed, and found to be due long before the defence of limitation was available."

Earlier, after referring to the provisions of Order 6, rule 17, he had said at page 649:

"From the imperative character of the last sentence of the rule it seems to me clear that, at any stage of the proceedings, all amendments ought to be allowed which satisfy the two conditions (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties."

These observations have been approved by this Court in *Patil's case*² where the Court said, at page 604:

"The same principles, we hold, should apply in the present case. The amendments do not really introduce a new case, and the application filed by the appellant himself showed that he was not taken by surprise; nor did he have to meet a new claim set up for the first time after the expiry of the period of limitation."

Batchelor, J., further said, at page 652 of the *Kisandas Rupchand's case*¹, after referring to certain statements of the plaintiff in the trial Court:

"It is difficult to imagine how the plaintiff could have more clearly professed that, whatever may have been the attitude of his obstinately unskilful pleader, he for his part had no concern with the alleged partnership, but was suing simply to recover his debt. I think, therefore, that the Subordinate Judge would have been well advised if he had paid more attention to the substance of the suit before him, and taken command of it himself rather than handed over the conduct of the suit to a manifestly inexperienced pleader; had he taken this view of his duty as presiding Judge, the slight technical difficulty which stood in his way would have been easily removed."

In *Patil's case*² amendment was allowed in the following circumstances. The plaintiff had obtained a decree for possession against defendant No. 2. He was obstructed during execution proceedings by defendant No. 1. His objection under Order 21, rule 97 was dismissed and therefore he filed a suit under Order 21, rule 103 for a declaration that he was entitled to recover possession of the suit properties from defendant No. 1. The contents of the plaint did not give the facts or the grounds on which the plaintiff based his title to the properties in suit as against defendant No. 1. This difficulty was pointed out by defendant No. 1 and subsequently the plaintiff asked for permission to give further and better particulars of the claim made in the plaint. This application was rejected by the trial Court. The trial Court did not allow this prayer and dismissed the suit. The High Court allowed the amendment of the plaint and this Court agreed with the order of the High Court. It is clear, as was observed by the Court at page 604 that this was not a case where a new claim was made by the amendment but was a case where the incomplete particulars given in the plaint were sought to be made complete by giving further particulars. The main object of the plaintiff was to

1. I.L.R. 33 Bom. 644.

A.I.R. 1957 S.C. 363.

2. (1957) S.C.J. 371; (1957) S.C.R. 595.

get a declaration of his right to possession against defendant No. 1. It was to achieve this object that he instituted the suit. He did not specify how he had a right to that property as against defendant No. 1 who was said to have no right to refuse delivery of possession to him. The only principle which can be deduced from this case is that amendment of the plaint can be allowed to make the plaint complete in particulars which would help in determining the real dispute between the parties, as raised by the plaint itself as originally presented.

Before dealing with *Charan Das's case*¹, reference may be made to the case reported as *Mohummud Zahoor Ali Khan v. Mussumat Thakooranee Rutta Koer*², which has been referred to in *Charan Das's case*¹. In this case the plaintiff brought a suit against several persons on the allegations that defendant No. 1 had borrowed certain money on a simple money bond executed on 9th August, 1856, and that the other defendants claimed her property and that therefore the suit be decreed against defendants and the property mentioned in the plaint with interest to date of realisation. Defendant No. 1 had also executed another bond on 28th November, 1857, to secure a further advance and had thereby pledged her zamindari estate to the plaintiff. The suit was however not based on the second bond. The Privy Council found that the suit should be dismissed against defendants other than defendant No. 1 and that it was open to the defence to ask for a decree for payment of an amount due on the bond against defendant No. 1, but could not claim a decree against the property on the basis of the second bond. In that connection it was observed at page 473 :

"Though this Committee is always disposed to give a liberal construction to pleadings in the Indian Courts, so as to allow every question fairly arising on the case made by the pleadings to be raised and discussed in the suit, yet this liberality of construction must have some limit. A plaintiff cannot be entitled to relief upon facts or documents not stated or referred to by him in his pleadings and the only thing that can be rightly insisted on by the plaintiff here is a decree for payment against Rutta Koer."

The Privy Council however considered whether inasmuch as the suit was wholly misconceived, whether the proper course was not to dismiss the appeal altogether without prejudice to the right of the plaintiff appellant to bring a new suit against defendant No. 1 upon the first point, and decided that that would not be the proper course as the fresh suit might be resisted on the ground of being barred by limitation, and as in the circumstances of the case such a defence in the fresh suit would be inequitable. The Privy Council therefore allowed the plaintiff to amend his plaint so as to make it a plaint against defendant No. 1 alone for the recovery of money due on a bond. Here again the defect was in the frame of the suit and did not relate to the real claim with respect to which the plaintiffs ought relief from the Court. The plaintiff sought recovery of money due on the bond executed by defendant No. 1. He however framed a suit not only against defendant No. 1 but against other defendants as well and claimed a decree for money against all of them and against the property. His suit was allowed to continue by making proper amendment with respect to part of the original claim, i.e., with respect to the recovery of money alone against defendant No. 1. This case shows that amendment of the plaint was allowed so as to make it a plaint against defendant No. 1 alone for the recovery of the claim even though if the original suit for that recovery had been instituted at the time it would have been barred by limitation.

In *Charan Das's case*¹, the plaintiff sued for a declaration of his right to pre-empt certain property. The suit so framed was not maintainable in view of section 42 of the Specific Relief Act, as the further relief for possession was not asked. The trial Court rejected the application for amending the plaint and dismissed the suit. The appeal against the dismissal of the suit was allowed and the suit was remanded for decision upon merits with liberty to the plaintiffs to amend their plaint by adding a claim for possession and by ante-dating the plaint according to the dates of the original suits. The Privy Council approved of the permission for

1. 39 M.L.J. 195 : (1920) L.R. 47 I.A. 255.

2. (1867) 11 M.I.A. 468.

the amendment of the plaint and, after quoting with approval the observations of the Judicial Commissioner to the effect:

"however defective the frame of the suit may be plaintiff's object was to pre-empt the land; the cause of action was one and the same whether they sued for possession or not."

said at page 262 :

"If this be so, all that happened was that the plaintiffs, through some clumsy blundering, attempted to assert rights that they undoubtedly possessed under the statute in a form which the statute did not permit. But if once it be accepted that they were attempting to establish those rights, there is no sufficient reason shown for disturbing the judgment of the Judicial Commissioner, who thinks they should be at liberty to express their intention in a plainer and less ambiguous manner. It may be noted that in the claim the relief sought is so awkwardly set out that it would be quite open to the interpretation that they had in fact claimed pre-emption and not a declaration of right"

These observations, again, make it clear that amendment was allowed with respect to a claim which, at the time when it was made, would have been time-barred because that claim could be spelt out of the original plaint which was held to be defectively framed. A defect in the frame of the plaint was not considered sufficient to disallow amendment and to dismiss the suit. The amendment of the plaint was necessitated due to clumsy drafting. The plaintiff was allowed to express his intention in a plainer and less ambiguous manner. It was these considerations which, according to the Privy Council, outweighed the consideration that the power of amendment should not as a rule be exercised where its effect be to take away from a defendant a legal right which had accrued to him by lapse of time and brought the case within the principle laid down in *Ali Khan's case*¹.

The next case to be considered is *Leach & Co.'s case*². In that case the plaintiffs had filed a suit for damages for conversion against the defendants on the allegation that they were the agents of the plaintiffs. This plea failed. On appeal, the appellate Court held that the parties stood in the relationship of seller and purchaser and not agent and principal. This Court, on further appeal, agreed with the findings of the appellate Court that the suit for damages on the footing of conversion must fail. The plaintiffs, however, applied to this Court for amendment of the plaint by raising, in the alternative, a claim for damages for breach of contract for non-delivery of the goods. The application was opposed on the ground that it introduced a new cause of action and a suit on that cause of action would be barred by limitation. This Court considered there was force in the objection but, after giving due weight to it was of the opinion that it was a fit case in which the amendment should be allowed as the new claim was based on a clause of the same agreement on which the suit had been founded and therefore could not be said to be foreign to the scope of the suit and as the prayer in the plaint was itself general and merely claimed damages. This Court observed at page 450:

"Thus, all the allegations which are necessary for sustaining a claim for damages for breach of contract are already in the plaint. What is lacking is only the allegation that the plaintiffs are, in the alternative, entitled to claim damages for breach of contract by the defendants in not delivering the goods."

Here again, the amendment allowed related to the form of relief which could be claimed on the basis of the facts alleged in the plaint and a clause of the document on the basis of which the suit was founded. The defect in the plaint was in giving a correct shape to the legal claim which was open to the plaintiff and the relief sought could be covered by the original relief which was couched in general language. It may further be mentioned that the amendment was considered just as the defendants themselves had cancelled the contract without strictly complying with the terms of the contract and the Court felt that the justice of the case required that the amendment be granted.

It would appear from the various cases discussed above that an amendment which would enable a plaintiff to make a claim which has become time-barred is as a rule to be refused and that the Court would exercise its special power to allow

1. (1867) 11 M.I.A. 468.

A.I.R. 1957 S.C. 357.

2. (1957) S.C.J. 313; (1957) S.C.R. 438.

such amendment only when there be special circumstances in the case. The nature of those special circumstances is to be gathered from those cases in which such an amendment was allowed. It appears to me that such special circumstances can be only when the amended claim was at least intended to be made by the plaintiff who had given in the plaint all the necessary facts to establish the claim but had due to clumsy drafting not been able to express himself clearly in the plaint and to couch his relief in the proper legal form. Such circumstances justify an amendment not really as a judicial concession to the plaintiff to save him from any possible loss but on the ground that the original claim in the plaint, though defectively stated, really amounted to the claim sought to be made by the amendment. Looked at in this way, the permission to amend does not in reality offend against the law of limitation and serves the interests of justice.

At this stage I may properly refer to what was said by the Privy Council in *Ma Shwe Mya v. Maing Mo Hnaung*¹. In that case the Privy Council had to consider whether the amendment allowed by the Judicial Commissioner, on appeal against the order of the District Judge, could be allowed in law or not. It observed at page 216 :

"All rules of Court are nothing but provisions intended to secure the proper administration of justice, and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but none the less no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject-matter of the suit."

It was held that the claim after amendment would be based on a different cause of action from that on which the original claim was based and therefore was not the real question in controversy between the parties in that suit. To allow the new claim would be to go outside the provisions of Order 6, rule 17, Civil Procedure Code.

I may now consider whether the facts of the present case are such as would justify the amendment of the plaint sought by the plaintiff-appellant. The plaint in the present case gives no facts which are necessary to establish before the plaintiff can get a decree for Rs. 65,000 or which may justify a decree for accounting. The schedule attached to the tender, Annexure A, shows that different rates of payment were agreed upon on different basis as unit of calculation for different types of work. The plaint nowhere indicates the amount of work done under each category and unless the plaintiff sets out the amount of work done he cannot certainly make out any claim for payment to him. It is said that the amount due to the plaintiff can be worked out on accounting on the basis of the bills tendered by him and to which the defendant had not raised any objection. No reference to such bills has been made in the plaint. Nothing is said in the plaint that the defendant had agreed to the bills tendered. To allow the amendment of the plaint would necessarily lead to a further request for the furnishing of these details about the work done and that would necessarily lead to the defendants being afforded an opportunity to put in a further written statement in connection with the fresh facts which would come on the record. In fact the amendment sought would necessitate practically a *de novo* trial on the question as to what amount the plaintiff is entitled from the defendant on account of the work done. The amended claim cannot be decreed on the facts on the record.

When the plaintiff cannot get the relief sought to be added as a result of the amendment on the facts mentioned in the plaint originally, it is clear that the cause of action for a decree for Rs. 65,000 is different from the cause of action on which the suit for declaration was founded. For the suit as originally instituted the plaintiff had merely to prove the terms of the contract between the parties and to show that his interpretation of these terms was the correct one and that interpretation justified the declaration sought. A suit based on one cause of action cannot be allowed to be changed into a suit based on another cause of action.

It cannot be said that the plaintiff intended to sue the defendant for the recovery of Rs. 65,000 but failed to express himself clearly in the plaint and that therefore he be allowed to make the plaint precise and clear in that regard. The plaintiff knew that he could make a claim for money and in para. 14 reserved the right under Order 2, rule 2 Civil Procedure Code to omit to sue in respect of that amount that be found due upon interpretation, 'placed by him on clause 17 of the tender. This indicates that he did not intend to sue for the amount due to him and that he anticipated the possibility of later suing for the recovery of the amount deliberately not sued for in the suit. This circumstance also justified the rejection of his prayer for amendment. The fact that the trial Court, by its judgment, allowed leave under Order 2, rule 2, of the Code to sue for the amount due subsequently is no circumstance to justify the amendment now sought. The omission of the defendant to press any objection against the prayer of the plaintiff for leave under Order 2, rule 2 is not such a special circumstance which should justify the amendment sought. Leave under Order 2, rule 2 can be sought by the plaintiff and can be given by the Court with respect to a plaintiff's not suing for certain relief arising out of the same cause of action as sub-rule (3) provides that a person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not, afterwards, sue for any relief omitted. It has been shown above that the cause of action for the relief of declaration was different from the cause of action for the claim of money. The relief for the money due did not arise from the cause of action on which the relief for declaration was based.

I am therefore of opinion that the High Court was right in not allowing the amendment sought by the plaintiff. The appeal therefore fails and I would dismiss it with costs.

ORDER OF THE COURT :—The appeal is allowed in accordance with the majority Judgment.

K.S.

Appeal allowed.

THE SUPREME COURT OF INDIA. (Original Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYATULLAH, J. C. SHAH AND S. M. SIKRI, JJ.

Jawaharlal

*Petitioner**

v.

The State of Rajasthan and others

Respondents:

Constitution of India (1950), Article 255—Act of State Legislature passed without complying with the provisions of Article 255—If can be validated by subsequent legislation.

Interpretation of statutes—Tax legislation—Retrospective operation—Permissibility—If per se involves contravention of Article 19 (1) (f) or (g) of the Constitution of India.

Rajasthan Passengers and Goods Taxation (Amendment and Validation) Act (XXII of 1964), sections 2 and 4—Validity.

Article 255 of the Constitution of India (1950) provides, *inter alia* that no Act of the Legislature of a State and no provision in any such Act, shall be invalid by reason only that some recommendation or previous sanction required by the Constitution of India was not given, if assent to the Act was given by the President later. The position with regard to the laws to which Article 255 applies, therefore, is that if the assent in question is given even after the Act is passed, it serves to cure the infirmity arising from the initial non-compliance with its provisions. In other words, if an Act is passed without obtaining the previous assent of the President, it does not become void by reason of the said infirmity; it may be said to be unenforceable until the assent is secured. Assuming that such a law is otherwise valid, its validity cannot be challenged only on the ground that the assent of the President was not obtained earlier as required by the other relevant provisions of the Constitution. The said

infirmity is cured by the subsequent assent and the law becomes enforceable. Besides, it is plain that the Legislature may in a suitable case, adopt the course of passing a subsequent law re-introducing the provisions of the earlier law which had received the assent of the President, and obtaining his assent thereto as prescribed by the Constitution. There is no substance in the argument that an Act which has not complied with the provisions of Article 255 cannot be validated by subsequent legislation even where such subsequent Act complies with Article 255. Whether the infirmity in the Act which has failed to comply with the provisions of Article 255 should be cured by obtaining the subsequent assent of the President or by passing a subsequent Act re-enacting the provisions of the earlier law and securing the assent of the President to such Act, is a matter which the Legislature can decide in the circumstances of a given case. Legally, there is no bar to the Legislature adopting either of the said two courses.

It is well-recognised that the power to legislate includes the power to legislate prospectively as well as retrospectively, and in that behalf, tax legislation is no different from any other legislation. If the Legislature decides to levy a tax, it may levy such tax either prospectively or even retrospectively. When retrospective legislation is passed imposing a tax, it may, in conceivable cases, become necessary to consider whether such retrospective taxation is reasonable or not. But apart from this theoretical aspect of the matter, the power to tax can be competently exercised by the Legislature either prospectively or retrospectively. The argument therefore that where a taxing statute purports to impose a tax retrospectively, it necessarily involves an element of unreasonableness and that it virtually amounts to contravention of the citizen's fundamental rights guaranteed under Article 19 (1) (f) or (g) of the Constitution of India, is unsound. It would be idle to contend that merely because a taxing statute purports to operate retrospectively the retrospective operation *per se* involves contravention of the fundamental rights guaranteed under Article 19 (1) (f) or (g). It is true that cases may conceivably occur where the Court may have to consider the question as to whether excessive retrospective operation prescribed by a taxing statute amounts to the contravention of the citizens' fundamental right; and in dealing with such a question, the Court may have to take into account all the relevant and surrounding facts and circumstances in relation to the taxation. In the present case, having regard to the legislative background of the provision prescribed by section 2 of the Rajasthan Passengers and Goods Taxation (Amendment and Validation Act (XXII of 1964) there can be no doubt that there is no element of unreasonableness involved in the retrospective operation of the provision prescribed thereunder. Section 2 of the Rajasthan Passengers and Goods Taxation (Amendment and Validation) Act (XXII of 1964) is therefore a valid piece of legislation.

Section 4 of the Rajasthan Passengers and Goods Taxation (Amendment and Validation) Act (XXII of 1964) is, however, not valid. What that section in truth and in substance says is that the failure to comply with the requirements of Article 255 of the Constitution of India will not invalidate the Rajasthan Finance Acts, 1961 and 1962 and will not invalidate any action taken, or to be taken, under their respective relevant provisions. In other words, the Legislature seems to say that even though Article 255 may not have been complied with by the said Finance Acts it is competent to pass section 4 of Rajasthan Act XXII of 1964 whereby it will prescribe that the failure to comply with Article 255 does not really matter and the assent of the President to that Act (Rajasthan Act XXII of 1964) amounts to this that the President also agrees that the Legislature is empowered to say that the infirmity resulting from the non-compliance with Article 255 does not matter. The Legislature is incompetent to declare that the failure to comply with Article 255 is of no consequence and the assent of the President to such declaration also does not serve the purpose which subsequent assent by the President can serve under Article 255.

The Legislature, no doubt, can validate an earlier Act which is invalid by reason of non-compliance with Article 255 and such an Act may receive the assent of the President which will make the Act effective. The Legislature cannot, however, itself declare by a statutory provision that the failure to comply with Article 255 can be cured by its own enactment even if the said enactment received the assent of the President. Even the assent of the President cannot alter the true constitutional position under Article 255. The assent of the President, cannot by any legislative process, be deemed to have been given to an earlier Act at a time when in fact it was not so given. In this context there is no scope for a retrospective deeming provision in regard to the assent of the President. The infirmity which rendered the Rajasthan Finance Acts, 1961 and 1962 unenforceable, could, therefore, be cured not by the Legislature itself acting on its own, but by the assent of the President and in so far as the Legislature by enacting section 4 of the Rajasthan Passengers and Goods Taxation (Amendment and

Validation) Act (XXII of 1964) purports to prescribe by its own fiat that the infirmity in question should be deemed to have been cured, it has clearly exceeded its legislative jurisdiction.

The result is, the higher rates of tax prescribed for the period between 26th March, 1962 and 9th September, 1964 by the notification issued under the Rajasthan Finance Act (XI of 1962) are not saved by the general provisions of section 4 of the Rajasthan Passengers and Goods Taxation (Amendment and Validation) Act (XXII of 1964) and hence for that period tax cannot be imposed at the enhanced rates prescribed by the Rajasthan Finance Act (XI of 1962) but can be levied only under the notification issued on 30th April, 1959 under section 3 of the Rajasthan Passengers and Goods Taxation Act (XVIII of 1959). The period between 26th March, 1962 to 9th September, 1964 is not covered, due to casual and somewhat careless drafting, by section 2 of the Rajasthan Act XXII of 1964 and so the provisions of that section are of no assistance in imposing a tax at the enhanced rates prescribed by the Rajasthan Finance Act (XI of 1962).

Petition under Article 32 of the Constitution of India for enforcement of fundamental rights.

M.M. Tiwari, Senior Advocate, (*Ganpat Rai*, Advocate, with him), for Petitioner.

G. C. Kalsiwal, Advocate-General for the State of Rajasthan, (*K. K. Jain* and *R. N. Sachthey*, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

Gajendragadkar, C.J.—The petitioner, Jawaharmal, carries on business of plying his motor buses on four routes under the State Carriage Permits granted to him under the relevant provisions of the Motor Vehicles Act, 1939. The three respondents to his petition respectively are : The State of Rajasthan, the Deputy Commissioner, Excise and Taxation (Appeals), Jaipur, and the Taxation Officer, (The Rajasthan Motor Vehicles) Sikar, State of Rajasthan. It appears that respondent No. 3 passed several assessment orders imposing different amounts of tax against his five vehicles which were running on the four routes in question. The periods for which these assessment orders were passed differed from vehicle to vehicle; but, on the whole, they covered the period between the 1st April, 1962 and the 30th September, 1964. The total amount of tax imposed in respect of these vehicles by the assessment orders in question is Rs. 19,062.93P. These orders have been passed under section 2 of the Rajasthan Passengers and Goods Taxation (Validation) Ordinance, 1964 (Ordinance No. IV of 1964). This Ordinance was made and promulgated by the Governor of Rajasthan on 15th May, 1964.

Aggrieved by these orders, the petitioner filed appeals before respondent No. 2 but respondent No. 2 refused to entertain the said appeals unless the petitioner paid in advance the tax imposed by the orders under appeals. Whilst these appeals were pending before respondent No. 2, the petitioner moved for stay in respect of the recovery of the tax assessed, but the said application was rejected on the ground that there was no provision in law to entertain any such application. That is why the petitioner submitted an application before the Commissioner, Commercial Taxes, Rajasthan on the 3rd February, 1962, and prayed that his buses should not be attached and sold in execution of the orders of assessment, against which he had preferred appeals, pending the hearing and final disposal of the said appeals. The Commissioner rejected this application on the 8th February, 1962. Respondent No. 3 then proceeded to attach one of the buses of the petitioner, viz., Bus No. RJP-854 and took possession of it. The petitioner thereupon paid the amount of the taxes as assessed by the impugned orders, but the payment was made under protest. The present petitioner has been filed by the petitioner under Article 32 of the Constitution challenging the validity of the assessment orders in question. The main ground on which the validity of the said orders is challenged, is that the Ordinance under which the impugned orders were passed and the Rajasthan Passengers and Goods Taxation (Amendment and Validation) Act, 1964 (XXII of 1964) (hereinafter called the Act) which repealed and replaced the said Ordinance are constitutionally invalid. The petitioner prays that this Court should hold that the Act is invalid.

should, by an appropriate writ, quash the impugned orders of assessment passed against him. The petitioner also claims that pending the final disposal of his petition, respondents, their servants, and agents should be restrained from realising the dues directed by the impugned orders and from seizing the other buses of the petitioner for the purpose of recovering the said tax.

In order to appreciate the contention of the petitioner that the Act is invalid, it is necessary to mention the legislative background of the Act. The Legislature of Rajasthan No. 1 passed an Act in 1959 (XVIII of 1959) known as the Rajasthan Passengers and Goods Taxation Act, 1959 (hereinafter called "the Principal Act"). This Act received the assent of the President on 27th April, 1959, was published in the Rajasthan Gazette on 30th April, 1959, and came into force on 1st May, 1959. The validity of this Act has been upheld by this Court in *Messrs. Sainik Motors, Jaipur and others v. The State of Rajasthan*¹. Section 3 of the principal Act authorised the State Government to levy, charge and collect tax on all fares and freights in respect of all passengers carried and goods transported by motor vehicles in Rajasthan. The said section further provided that the rate of the tax shall not exceed 1/8th of the value of fare or freight in the case of cemented, tarred, asphalted, metalled gravel and kankar roads, and shall not exceed 1/12th of such value in other cases which may be notified by the State Government from time to time.

Section 21 of the principal Act authorised the Government of Rajasthan to make Rules consistent with the said Act for securing the payment of tax and generally for the purposes of carrying into effect its provisions. Accordingly, the Government of Rajasthan framed suitable Rules which came into force on the 21st May, 1959. Thereupon, a notification was issued by respondent No. 1 on the 30th April, 1959 under section 3 of the said Act and it came into force on 1st May, 1959; it prescribed the manner in which, and the rates at which, the tax shall be charged and collected. These rates were the same as had been prescribed by section 3 of the principal Act as maximum permissible rates. This notification was made effective on 1st May, 1959. There is no dispute that the principal Act is valid and that the notification issued under it is also valid.

In 1961, the Rajasthan Finance Act (XIV of 1961) was passed. Section 8 of this Act purported to amend section 3 of the principal Act. As a result, of this amendment, the maximum rate at which the State Government could levy charge and collect tax on fares and freights was increased from 1/8th to 15 per cent. in the first category of cases; and in the second category of cases it was increased from 1/12th to 10 per cent. In pursuance of the provisions of this Finance Act, respondent No. 1 issued a notification on the 9th March, 1961 levying tax at the said maximum permissible rates. Neither the Bill in respect of this Act received the assent of the President before it was introduced in the State Legislature, nor did this Act receive his assent after it was passed.

In 1962, the Rajasthan Finance Act (XI of 1962) was passed. Section 9 of this Act amended section 3 of the principal Act and authorised the increase of the two respective taxes to 20 per cent. and 15 per cent. respectively. A notification was then issued by respondent No. 1 under the provisions of section 9 of the said Act. This notification authorised levy of taxes at the maximum rates permissible under section 9. Neither the bill in respect of this Act before it was introduced in the State Legislature, nor this Act after it was passed received the assent of the President.

Then followed the Finance Act (XIII of 1963). This Act purported to amend section 11 of the principal Act; but with this amendment we are not concerned in the present proceedings.

It appears that the constitutional validity of the material provisions of the principal Act and Rules and notifications issued under it as well as the constitutional

1. (1962) 1 S.C.R. 517 : (1963) 1 S.C.J. 292 : A.I.R., 1961 S.C. 1480.

validity of the Finance Acts of 1961 and 1962 and the notifications issued respectively thereunder was challenged by a number of bus operators by writ petitions filed by them before the Rajasthan High Court under Article 226 of the Constitution. During the pendency of these writ petitions, the Rajasthan Ordinance No. IV of 1964 was promulgated. Later, the said Ordinance was repealed and replaced by the Act with which we are concerned in the present proceedings. This Act came into force on the 9th September, 1964 having received the assent of the President on the 8th September, 1964.

The writ petitions filed by the other bus operators were decided by the said High Court on the 30th November, 1964 vide *Vijai Singh and another v. Deputy Commissioner, Excise and Taxation (Appeals), Ajmer and Kotah Divisions, Jaipur and others*¹. In substance, the High Court has held in that case that the earlier Finance Acts of 1961 and 1962 suffered from the infirmity that they did not comply with the requirements of Article 255 of the Constitution. It, however, did not think it necessary to finally determine the question as to whether by reason of the said infirmity, the said earlier Acts were void or not, because in its opinion, the Act of 1964 "is not merely an amending and a curative Act in that limited sense, but it is really an Act which virtually re-enacts the provisions of the earlier Acts which suffered from a constitutional infirmity" (page 300). The High Court examined the contentions raised by the petitioners that the provisions of the Act were invalid, and has rejected the petitioner's case that the said provisions suffered from any constitutional infirmity. In the result, the petitions filed before it challenging the validity of the Act failed. It appears that the petitioners had also challenged the validity of the recovery of penalty for non-payment of tax, and the High Court held, following its earlier decisions, that the levy of any penalty in the cases before it would be illegal and, therefore, must be struck down. In other words, except for the limited relief granted in respect of the levying of the penalty, the substantial contention raised by the petitioners challenging the validity of the Act has been rejected by the High Court. Against this judgment, the High Court has granted certificates of fitness for leave to appeal to this Court and the record in the said appeals is being printed in the High Court. In that sense, the said appeals can be said to be pending before this Court.

The learned Advocate-General who has appeared for the respondents in the present writ proceedings, requested us to postpone the hearing of this writ petition and take it up along with the appeals to which we have just referred. We did not, however, accede to this request, because we thought that it would not be right to postpone the hearing of the present writ petition for an indefinitely long period, and so, we allowed the learned Advocate-General to argue the matter fully and refer us to the judgment of the Rajasthan High Court which is under appeal in the said appeals. We made it clear to the learned Advocate-General that our decision in the present writ petition would cover the decision of the said appeals in so far as it would relate to the validity of the provisions of the Act which are impugned before us by the present petitioner and not to that part which covered the question of penalty. Accordingly, the learned Advocate-General has elaborately addressed us on the relevant points and has taken us through the relevant portions of the judgment of the Rajasthan High Court in the case of *Vijai Singh*¹.

The respondents filed their written statement in the present proceedings and they urged that the petitioner's challenge to the validity of the relevant provisions of the Act should not be sustained. According to them the Act is constitutionally valid and the impugned orders of assessment are fully justified by the said provisions. That is how the main question which falls to be considered in the present writ petition is whether the relevant provisions of the Act are valid or not.

Let us therefore proceed to refer to the provisions of the Act and enquire whether the petitioner is justified in challenging their validity. The Act consists of

five sections. Section 1 gives its title; section 2 amends section 3 of the principal Act; section 3 deals with validation of certain lump sum payments in lieu of tax; section 4 purports to validate certain sections of the Rajasthan Acts, XIV of 1961, XI of 1962 and XIII of 1963; it also purports to validate the tax levied, paid or payable and action taken or things done during the period between the 9th day of March, 1961 and the date of commencement of this Act. The last section 5 repeals Ordinance No. IV of 1964. In the present proceedings we are not concerned with lump sum payments; and so, section 3 does not fall to be considered.

At this stage it is convenient to set out sections 2 and 4. They read as under :—

"2. In section 3 of the Rajasthan Passengers and Goods Taxation Act, 1959 (Rajasthan Act XVIII of 1959), hereinafter referred to as the principal Act, to sub-section (1), the following proviso shall be and be deemed always to have been added, namely :—

"Provided that the tax shall be charged in respect of all passengers carried and goods transported by motor vehicles,—

(a) during the period between the 1st day of May, 1959 and the 8th day of March, 1961, at the rate of—

(i) one-eighth of the value of the fare or freight in case of cemented, tarred, asphalted, metalled gravel and kankar roads and

(ii) one-twelfth of the fare or freight, in other cases, subject to a minimum of one Naya Paisa in any one case, the amount of tax being calculated to the nearest Naya Paisa; and

(b) during the period between the 9th day of March, 1961 and the 25th day of March, 1962, at the rate of—

(i) fifteen per cent. of the value of the fare or freight in the case of cemented, tarred, asphalted, metalled, gravel and kankar roads, and

(ii) ten per cent. of the fare or freight in other cases subject to a minimum of one Naya Paisa in any one case, the amount of tax being calculated to the nearest Naya Paisa."

"4. Notwithstanding any judgment, decree or order of any Court, but subject to the provisions of this Act, section 8 of the Rajasthan Finance Act, 1961 (Rajasthan Act XIV of 1961), section 9 of the Rajasthan Finance Act, 1962 (Rajasthan Act XI of 1962), and section 14 of the Rajasthan Finance Act, 1963 (Rajasthan Act XIII of 1962) shall not be deemed to be invalid, or ever to have been invalid during the period between the 9th day of March, 1961 and the date of commencement of this Act, merely by reason of the fact that the Bills, which were enacted as the Acts aforesaid, were introduced in the Rajasthan State Legislature without the previous sanction of the President under the proviso to Article 304 (b) of the Constitution and were not assented to by the President and the tax levied, paid or payable, the composition fee paid or payable and any action taken or things done or purporting to have been taken or done during the period aforesaid under the Rajasthan Passengers and Goods Taxation Act, 1959 (Rajasthan Act XVIII of 1959), as amended by the Acts aforesaid, shall be deemed always to have been validly levied, paid, payable, taken or done in accordance with law and the aforesaid enactments shall be, and be deemed always to have been, validly enacted, notwithstanding the aforesaid defects, and accordingly :

(a) no suit or other proceeding shall be instituted, maintained or continued in any Court for the refund of any tax or fee so paid or for any other relief on the ground of invalidity of the said sections of the Acts aforesaid; and

(b) no Court shall enforce any decree or order directing any such refund or relief."

Mr. Tiwari for the petitioner contends that sections 2 and 4 purport to validate the earlier invalid Finance Acts of 1961 and 1962. He argues that the failure of the Legislature to comply with the provisions of Article 255 of the Constitution renders the said Acts void *ab initio* and as such, they cannot be validated by subsequent legislation. Mr. Tiwari also urges that the said earlier Acts have been held to be invalid by the Rajasthan High Court in the case of *Vijai Singh*¹ and it would be incompetent to the State Legislature to validate the said Acts in spite of the decision of a Court of competent jurisdiction.

We are not impressed by this argument. In the first place, it is not clear that the Rajasthan High Court has held that the said earlier Finance Acts are void *ab initio*; in fact, as we have already pointed out, the said High Court thought it unnecessary to pronounce its considered opinion on that aspect of the matter, because it held that the Act of 1964 with which it was primarily dealing in the said proceedings not merely amended or cured the earlier Finance Acts, but re-enacted the provisions of the said Acts, and so, the provisions of the said Acts became opera-

tive by their own force. Therefore, factually, it is not correct to say that the said earlier Acts have been struck down as void *ab initio* by any Court of competent jurisdiction. Besides, in assessing the validity of this argument, it is necessary to remember that the Act was passed on 8th September, 1964 and the judgment of the Rajasthan High Court was pronounced on 30th November, 1964; and so, it is clear that at the time when the Act was passed the earlier Finance Acts had not been struck down at all.

The next question to consider is whether an Act which suffers from the infirmity that it does not comply with the requirements of Article 255, can be validated by subsequent legislation. There are two answers to this question, Article 255 provides, *inter alia*, that no Act of the Legislature of a State and no provisions in any such Act, shall be invalid by reason only that some recommendation or previous sanction required by this Constitution was not given, if assent to the Act was given by the President later. The position with regard to the laws to which Article 255 applies, therefore, is that if the assent in question is given even after the Act is passed, it serves to cure the infirmity arising from the initial non-compliance with its provisions. In other words, if an Act is passed without obtaining the previous assent of the President, it does not become void by reason of the said infirmity; it may be said to be unenforceable until the assent is secured. Assuming that such a law is otherwise valid, its validity cannot be challenged only on the ground that the assent of the President was not obtained earlier as required by the other relevant provisions of the Constitution. The said infirmity is cured by the subsequent assent and the law becomes enforceable. It is unnecessary for the purpose of the present proceedings to consider when such a law becomes enforceable, whether subsequent assent makes it enforceable from the date when the said law purported to come into force, or whether it becomes enforceable from the date of its subsequent assent. Besides, it is plain that the Legislature may, in a suitable case, adopt the course of passing a subsequent law re-introducing the provisions of the earlier law which had not received the assent of the President, and obtaining his assent thereto as prescribed by the Constitution. We see no substance in the argument that an Act which has not complied with the provisions of Article 255, cannot be validated by subsequent legislation even where such subsequent Act complies with Article 255 and obtains the requisite assent of the President as prescribed by the Constitution. Whether the infirmity in the Act which has failed to comply with the provisions of Article 255, should be cured by obtaining the subsequent assent of the President or by passing a subsequent Act re-enacting the provisions of the earlier law and securing the assent of the President to such Act, is a matter which the Legislature can decide in the circumstances of a given case. Legally, there is no bar to the Legislature adopting either of the said two courses. Therefore, the preliminary objection raised by Mr. Tiwari against the validity of the Act fails.

That takes us to the construction of sections 2 and 4 of the Act. It would be noticed that section 2 in fact does not purport to validate the earlier Finance Acts of 1961 and 1962. What it does is to amend retrospectively section 3 of the principal Act by inserting a proviso to sub-section (1) of the said section. On its plain reading, section 2 has the effect of inserting the said proviso to section 3 (1) of the principal Act, and since the amendment so made is, in terms, retrospective, when a tax is levied for the periods covered by clauses (a) and (b) of the proviso thus introduced in section 3 (1) of the principal Act, the Court must proceed to deal with the matter on the basis that these clauses had been introduced in the principal Act right up from the commencement. We have already noticed that the principal Act has been held to be valid by this Court and so, we see no basis for the argument that in amending section 3 (1) of the principal Act, section 2 of the Act has contravened any Constitutional prohibition.

It is well-recognised that the power to legislate includes the power to legislate prospectively as well as retrospectively, and in that behalf, tax legislation is no different from any other legislation. If the Legislature decides to levy a tax, it may levy such tax either prospectively or even retrospectively. When retrospective

legislation is passed imposing a tax, it may, in conceivable cases, become necessary to consider whether such retrospective taxation is reasonable or not. But apart from this theoretical aspect of the matter, the power to tax can be competently exercised by the Legislature either prospectively or retrospectively; and that is precisely what section 2 has done in the present case. Therefore, there is no substance in the argument that section 2 of the Act is invalid.

As the said section 2 has been drafted, it appears clear that clause (a) of the proviso added by it to section 3 (1) of the principal Act, covers the period between 1st May, 1959 and the 8th March, 1961, whereas clause (b) covers the period between the 9th March, 1961 and the 25th March, 1962. The first period had in fact been already covered by a notification validly issued on 30th April, 1959 under section 3 of the principal Act; and so, it is not easy to understand why it was thought necessary to refer to this period by the said retrospective amendment. The second period had been attempted to be covered by Finance Act XIV of 1961 and the notification issued thereunder. In order to make the provisions of the said notification effective, the Legislature has adopted the legitimate expedient of making the said provisions a part of the amendment which has been introduced into section 3 (1) of the principal Act; and so, the rates prescribed by clause (b) can be validly imposed during the said period. But it is obvious that the third period covered by the Finance Act XI of 1962 and the notification issued under it has not been included in the retrospective amendment introduced by section 2; this period ranges between 26th March, 1962 and the 9th September, 1964; and so, the rates prescribed by the notification issued under the relevant provisions of the said Finance Act are not re-enacted by the amendment made by section 2. In other words, section 2 does not purport to re-enact, by retrospective amendment, the rates prescribed by the notification issued under the Finance Act XI of 1962. We are inclined to take the view that the draftsmen of the Act have referred to the first period unnecessarily in the said proviso, and have failed to refer to the third period, through oversight. This infirmity tends to show that the drafting of section 2 has been casual and somewhat careless. As we will presently point out, the consequence would be that the higher rates prescribed for the period between 26th March, 1962 and the 9th September, 1964 by the notification issued under Finance Act XI of 1962, are not saved by the general provisions of section 4 of the Act. It is to the said provisions that we must now turn.

Section 4 consists of three parts. In its first part, it provides that the several sections of the three Finance Acts enumerated by it, shall not be deemed to be invalid, or ever to have been invalid, during the period there specified, merely by reason of the fact that Article 255 of the Constitution had not been complied with. Part 2 of the said section provides, *inter alia*, that the tax levied, paid or payable during the period as amended by the said specified Acts, shall be deemed always to have been validly levied, paid or payable; and Part 3 prescribes that the aforesaid enactments shall be, and be deemed always to have been, validly enacted, notwithstanding the aforesaid defects. The question which arises for our decision is whether this section is valid.

In dealing with this question, we must, of course, bear in mind the fact that the Act and all its provisions have received the assent of the President; and so, *prima facie*, the assent of the President to the Act would help the Act to validate the provisions of the earlier Acts which were not enforceable by reason of the fact that they had not secured his assent as required by Article 255. But can the assent of the President to the Act serve the purpose of making section 4 valid? What section 4 in truth and in substance says is that the failure to comply with the requirements of Article 255 will not invalidate the Finance Acts in question and will not invalidate any action taken, or to be taken, under their respective relevant provisions. In other words, the Legislature seems to say by section 4 that even though Article 255 may not have been complied with by the earlier Finance Acts, it is competent to pass section 4 whereby it will prescribe that the failure to comply with Article 255 does not really matter, and the assent of the President to the Act amounts

to this that the President also agrees that the Legislature is empowered to say that the infirmity resulting from the non-compliance with Article 255 does not matter. In our opinion, the Legislature is incompetent to declare that the failure to comply with Article 255 is of no consequence; and, with respect, the assent of the President to such declaration also does not serve the purpose which subsequent assent by the President can serve under Article 255.

The learned Advocate-General has strenuously contended before us that we should look at the substance of the matter and not decide the validity of section 4 merely because the words used in it may not be happy or appropriate. We agree that questions of this character must be judged on consideration of substance and not merely of form, and we have tried to read section 4 as favourably as we can while appreciating the argument of the learned Advocate-General; but the words used in all the three parts of section 4 are clear and unambiguous; they indicate that the Legislature thought that it was competent to it to cure, by its own legislative process, the infirmity resulting from the non-compliance with Article 255 when it passed the earlier Finance Acts in question, and it was probably advised that such a legislative declaration would be valid and effective, provided it received the assent of the President. In our opinion, the approach adopted by the Legislature in this case is entirely misconceived. The Legislature, no doubt, can validate an earlier Act which is invalid by reason of non-compliance with Article 255 and such an Act may receive the assent of the President which will make the Act effective. The Legislature cannot, however, itself declare by a statutory provision that the failure to comply with Article 255 can be cured by its own enactment, even if the said enactment received the assent of the President. In our opinion, even the assent of the President cannot alter the true constitutional position under Article 255. The assent of the President cannot, by any legislative process, be deemed to have been given to an earlier Act at a time when in fact it was not so given. In this context there is no scope for a retrospective deeming provision in regard to the assent of the President. It is somewhat unfortunate that the casual drafting of section 2 leaves the period covered by Act XI of 1962 and the notification issued thereunder as unenforceable as before, and the omnibus and general provisions of section 4 are of no help in regard to the said period.

The learned Advocate-General strongly relied on the last part of section 4. This part provides that the aforesaid enactments shall be, and be deemed always to have been, validly enacted, notwithstanding the aforesaid defects. The clause "notwithstanding the aforesaid defects" emphatically points to the fact that the Legislature thought that it could legislate, retrospectively, and by such retrospective legislation, it could itself cure the infirmity in question. What has been overlooked by the Legislature is the fact that the infirmity in question can be cured only by obtaining the assent of the President and not by any legislative fiat. We have given our anxious consideration to the problem raised by the wording of section 4 and we have come to the conclusion that it would not be possible to uphold its validity. On many occasions, this Court has tried to look at the substance of the matter and determine the issue in spite of the fact that the words or expressions used in the relevant provisions are either slovenly inappropriate or unhappy. But in the present case, however benevolently or favourably we look at the provisions of section 4, we see no escape from the conclusion that in enacting it, the Legislature appears to have clearly assumed that it can by itself cure the infirmity resulting from the non-compliance with Article 255 and all that it has to do in such a case is to obtain the assent of the President to its own view about its power to cure such an infirmity. We are satisfied that it is necessary that the true position in regard to the scope and effect of Article 255 must be clearly brought out in order to avoid any misapprehension in future.

In support of his argument that the form adopted by the Legislature in enacting section 4 is not inappropriate, the learned Advocate-General has referred us to a

decision of this Court in *M. P. V. Sundararamier & Co. v. The State of Andhra Pradesh and another*¹. It is true that in that case, section 2 of the Sales Tax Laws Validation Act, 1956 (VII of 1956), which is a Central Act, used phraseology which is similar to the phraseology adopted by section 4 of the Act; but it would be fallacious to compare the said provision with section 4, because the ban which section 2 of the said Act intended to lift could validly be lifted by a Parliamentary statute. Article 286 (2) of the Constitution which was in force at the relevant time had provided, *inter alia* that except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place in the course of inter-State trade or commerce. What section 2 of the said Act did was to make a law as expressly authorised by Article 286 (2); and naturally in exercise of the power conferred on it by the said provision, it enacted the provisions of section 2 and made them retrospective. It is significant that the power to lift the ban which was exercised retrospectively by Parliament, vested in Parliament and not in any outside authority like the President; and so, Parliament was perfectly competent to validate the several State Acts which were held to be invalid, by adopting the legislative expedient of making a law as authorised by Article 286 (2) and providing for its retrospective operation. The position with regard to section 4 is logically and fundamentally different; the infirmity which rendered the earlier Finance Acts unenforceable, could be cured not by the Legislature itself acting on its own, but by the assent of the President; and in so far as the Legislature by enacting section 4 purports to prescribe by its own fiat that the infirmity in question should be deemed to have been cured, it has clearly exceeded its legislative jurisdiction. Therefore, we do not think that decision of this Court in *Sundaramier & Co.'s case*¹ can be of any help to the learned Advocate-General in support of his argument that section 4 has been validly enacted.

There is one more point which still remains to be considered. Mr. Tiwari urged that the retrospective operation of the amendment made by section 2 of the Act in section 3 (1) of the principal Act, should be held to be unconstitutional inasmuch as the retrospective operation of the provision prescribed by clause (b) of the proviso added by section 2 suffers from the infirmity that it imposes enhanced tax duty retrospectively. His argument is where a taxing Statute purports to impose a tax retrospectively, it necessarily involves an element of unreasonableness and that virtually amounts to contravention of the citizens' fundamental rights guaranteed under Article 19 (1) (f) or (g) of the Constitution. For the purpose of the present writ petition, we will assume that notwithstanding the proclamation of emergency issued by the President under Article 352, the constitutional bar created by Article 358 does not operate against the petitioner inasmuch as he relies upon the contravention of his fundamental right prior to the date of the proclamation. It is on that assumption that we wish to deal with the contention raised by Mr. Tiwari. In our opinion, the said contention is plainly unsound. We have already stated that the power to make laws involves the power to make them effective prospectively as well as retrospectively, and tax laws are no exception to this rule. So, it would be idle to contend that merely because a taxing statute purports to operate retrospectively, the retrospective operation *per se* involves contravention of the fundamental right of the citizen taxed under Article 19 (1) (f) or (g). It is true that cases may conceivably occur where the Court may have to consider the question as to whether excessive retrospective operation prescribed by a taxing statute amounts to the contravention of the citizens' fundamental right; and in dealing with such a question, the Court may have to take into account all the relevant and surrounding facts and circumstances in relation to the taxation. In the present case, having regard to the legislative background of the provisions prescribed by section 2, there can be little doubt that there is no element of unreasonableness involved in the retrospective operation of clause (b) of the proviso added by the said section to section 3 (1) of the principal Act.

¹. (1958) S.C.J. 459 : (1958) 1 M.L.J. (158) S.C.R. 1422 A.I.R. 1958 S.C. 468.
(S.C.) 179 : (1958) 1 An.W.R. (S.C.) 179;

The result is that section 2 of the Act is valid and the tax in question can be recovered from the petitioner for the periods covered by clauses (a) and (b) of the proviso as therein prescribed. In this connection, it will be recalled that the provision prescribed by clause (a) of the proviso is really superfluous, because the same tax could have been validly recovered at the prescribed rates under the notification issued on 30th April, 1959 under section 3 of the principal Act. But as we have already pointed out, the period between 26th March, 1962 to 9th September, 1964 is not covered by the provisions inserted by section 2 in section 3 (1) of the principal Act; and so, the provisions of section 2 are of no assistance to the respondents in imposing a tax against the petitioner at the enhanced rates initially prescribed by section 9 of the Finance Act XI of 1962. If we had held that section 4 of the Act was valid, then the imposition of the tax at the enhanced rates prescribed by the said section 9 would also have been valid; but in view of the fact that we have come to the conclusion that section 4 is invalid, it follows that the tax which can be legitimately and validly imposed against the petitioner for the said period must be levied under the notification issued on 30th April, 1959 under section 3 of the principal Act. No doubt, Mr. Tiwari attempted to argue that in view of the fact that the said section 3 had been amended by section 9 of the Finance Act XI of 1962 the notification issued under the original section 3 of the principal Act ceases to be operative. This contention is clearly misconceived. If the said Finance Act is unenforceable and the notification issued thereunder is of no effect, then section 3 of the principal Act would remain unamended for the period in question and the notification initially issued under it would be operative.

As a consequence of this conclusion, it follows that the petitioner is entitled to claim that the tax assessed against him in respect of his vehicles for the period between 26th March, 1962 and the 9th September, 1964 at the enhanced rates is invalid, and that the taxing authorities concerned will have to levy the tax at the rates prescribed by the notification issued on the 30th April, 1959 under section 3 of the principal Act as it originally stood. It is true that this result sounds very anomalous, because for the period immediately preceding the period in question, the tax is validly recoverable at the enhanced rates, whereas for the period in question, it has to be recovered at a lower rate; but for this anomaly, the defective drafting of section 2 and section 4 of the Act is entirely responsible.

Before we part with this petition, we would like to refer briefly to two decisions of this Court to which reference was made during the course of the arguments before us. In *Rai Ramkrishna and others v. The State of Bihar*¹, the validity of the Bihar Taxation on Passengers and Goods (Carried by Public Service Motor Vehicles) Act, 1961 (XVII of 1961) was challenged on the ground that it sought to validate taxes already recovered under an invalid Finance Act. Rejecting the argument that such retrospective validation of tax illegally recovered amounts to the contravention of the citizens' fundamental right under Article 19 (1) (f) or (g), this Court held that if in its essential features a taxing statute is within the competence of the Legislature which passed it, its character is not necessarily changed merely by its retrospective operation so as to make the said retrospective operation either unreasonable or outside its legislative competence.

A similar view has been expressed by this Court in *Jaora Sugar Mills (Pvt.) Ltd. v. The State of Madhya Pradesh and others*².

The result is, the writ petition is partly allowed and the impugned orders of assessment are set aside in so far as they relate to the period between 26th March, 1962 and the 9th September, 1964, and we direct the assessing authorities to levy a proper assessment in the light of this judgment. The assessment orders in respect of the remaining period are valid and the petitioner's prayer that they should be set aside, is rejected. In view of the fact that the petitioner has succeeded only partially, we direct that parties should bear their own costs.

V.K.

Petition partly allowed.

1. (1964) 2 S.C.J. 749 : (1964) 1 S.C.R. 897 : 2. Since reported in (1967) 1 S.C.J. 98.
A.I.R. 1963 S.C. 1667.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH, V. RAMASWAMI AND V. BHARGAVA, JJ.

Commissioner of Income-tax, Calcutta

.. Appellant*

v.

Bidhu Bhusan Sarkar (Deceased) through his legal representative

.. Respondent.

Income-tax Act (XI of 1922), sections 5 (7-A) and 34—Back assessment—Initiation by and pendency of proceedings before two Officers—Order by one “the case is therefore filed”—Scope of the order—Transfer of case—“Case” includes pending proceedings as well as proceedings to be instituted—No specific case pending—Order of transfer—Valid—Words and Phrases—“Filed”—“Case”.

For the assessment year 1947-48, after the assessee had filed a voluntary return on 22nd December, 1947, the assessee's place of business, as a result of change in the territorial jurisdiction, came within the jurisdiction of another office containing a Principal Officer and Additional Officers. The Additional Officer within whose jurisdiction the case of the assessee fell, issued a notice of back assessment on 23rd February, 1950. In the meantime the assessee had filed another voluntary return before the Principal Officer on 31st March, 1949, in respect of his income from military contracts. The Additional Officer in respect of the proceedings pending before him, made the order “the case is, therefore, filed”. The Principal Officer cancelled the proceedings pending before him on 12th February, 1952, and on the same day issued a notice of reassessment, resulting in an order of assessment dated 31st January, 1953. In the appeal against the order, the Principal Officer himself conceded his lack of jurisdiction over the assessee and requested that the assessment should be set aside. The Appellate Commissioner set aside the assessment and directed that the assessment should be completed according to law by the Officer having proper jurisdiction. On 30th December, 1955 the Commissioner transferred the case to the file of the Principal Officer. The order made by the Appellate Commissioner was set aside by the Tribunal on 23rd April, 1957, in appeal. In the meanwhile as a result of the transfer order and direction of the Appellate Commissioner the Principal Officer, on 11th February 1956, had made an order of reassessment after notice. On the High Court holding against the Revenue in reference, the Revenue appealed.

Held, that the word “filed” should be interpreted, in the circumstances, as being equivalent to “disposed of” so that after that order, no proceedings on the basis of notice dated 23rd February, 1950 remained pending before the Additional Officer. The Principal Officer became seized of the jurisdiction to take proceedings against the assessee after the date of transfer and as the proceedings were commenced with the issue of a notice dated 11th February, 1956, and the actual order of assessment was made on 2nd May, 1956, within one year of the date of the notice, it was a valid order of assessment and was not barred by time.

The Additional Officer was aware of the pending proceedings before the Principal Officer and his intention in making the order “the case is, therefore, filed” was to drop the proceedings pending before him.

Even if the order of the Additional Officer was an invalid order, its effect cannot be that the proceedings before him must be held to have continued after that order was made by him. Even an invalid order terminating the proceedings has the effect of terminating them; and unless that order was vacated by a higher authority, it remains in full force, and takes full effect. That order would not be totally without jurisdiction; at best, it was an order not contemplated by law and it could not be treated as a non-existing order.

The *Explanation* to section 5 (7-A) makes it clear that the word “case” in relation to any person whose name is specified in the order of transfer, means all proceedings under the Act in respect of any year which may be pending on the date of the transfer, and also includes all proceedings under the Act which may be commenced after the date of the transfer in respect of any year. The word “case” is thus used in a comprehensive sense of including both pending proceedings as well as proceedings to be instituted in future. An order of transfer could be made even if no specific proceeding was pending.

Appeal from the Judgment and Order dated the 10th January, 1962, of the High Court at Calcutta in Income-tax Reference No. 22 of 1960.

S. V. Gupte, Solicitor-General of India (*N. D. Karkhanis* and *R. N. Sachthey*, Advocates, with him), for Appellant.

A. K. Sen, Senior Advocate (*P. K. Mukherjee* and *S. K. Banerjee*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Bhargava, J.—The assessee in the proceedings out of which this appeal has arisen was Bidhu Bhushan Sarkar, who died and is now represented in these proceedings through his legal representative. The assessee used to be assessed by the Income-tax Officer of District 24 Parganas in Bengal. For the assessment year 1947-48, the assessee filed a voluntary return before the Income-tax Officer on 22nd December, 1947, showing a net loss of Rs. 330. This return was filed without any notice under section 22 (2) of the Income-tax Act having been served on him. Before any proceedings could be completed on that return, there was change in territorial jurisdiction and as a result, the assessee's place of business came within the jurisdiction of the Income-tax Officer, District I (2), Calcutta. In this Income-tax Office, there were a number of Income-tax Officers. The senior most Income-tax Officer used to be designated as Income-tax Officer, District I (2), and was treated as the Principal Income-tax Officer (hereinafter referred to as "the P.I.T.O."). Since there were a number of Additional Income-tax Officers, there was distribution of jurisdiction, and the case of the assessee fell within the jurisdiction of the 8th Additional Income-tax Officer, District I (2) (hereinafter referred to as "the A.I.T.O."), and consequently, came up before him. On 16th January, 1949, the A.I.T.O. started departmental proceedings with the object of taking proceedings under section 34, presumably because he considered the voluntary return declaring a loss of Rs. 330 as invalid. He, therefore, issued a notice, under section 34 on 23rd February, 1950. In the meantime on 31st March, 1949, the assessee had filed another voluntary return for the same assessment year in respect of his income from military contracts before the P.I.T.O., and in this return he declared a loss of Rs. 11,33,940. The proceedings pending before the A.I.T.O. in pursuance of his notice dated 23rd February, 1950, came up before him on the 4th February, 1952. On that date, he passed the following order which may, for convenience, be reproduced in full, as this case turns mainly upon the interpretation of this order :—

"Mr. Kalipada Bose, constituted attorney, appears and submits that the old return already submitted may be treated to be submitted in response to notice under section 34 (1) (a). The income should be taken in the assessment of the military contract income for which there is another file. The case is, therefore, filed."

The proceedings before the P.I.T.O. on the voluntary return filed by the assessee on the 31st March, 1949, were continuing, and in those proceedings he issued a notice under section 23 (2) on 1st August, 1950. Subsequently, on 12th February, 1952, he cancelled those proceedings on the view that a voluntary return of loss was not valid, took proceedings under section 34, and issued a notice under that section on the same day. These proceedings under section 34 culminated in an order of assessment by the P.I.T.O. under section 34 (4) passed on 31st January, 1953. The assessee filed an appeal against that order of assessment and when the appeal came up, the P.I.T.O. himself drew the attention of the Appellate Assistant Commissioner to the fact that he had no jurisdiction over the assessee as there was already a file of the assessee with the A.I.T.O. He, therefore, requested that the assessment should be set aside as it was void *ab initio*. The Appellate Assistant Commissioner accepted this request of the P.I.T.O., set aside the assessment on 7th December, 1955, and made a direction that the assessment could be completed according to law by the officer having proper jurisdiction over the case. Thereafter, on the 30th December, 1955, the Commissioner of Income-tax made an order transferring the case of the assessee from the A.I.T.O. to the P.I.T.O. There was an appeal by the assessee against the direction of the Appellate Assistant Commissioner that the assessment should be completed by the officer having proper jurisdiction over the case. That

appeal was allowed by the Income-tax Appellate Tribunal on the 23rd April, 1957 and the direction of the Appellate Assistant Commissioner was set aside. In the meantime, in pursuance of the direction of the Appellate Assistant Commissioner contained in his order dated 7th December, 1955, and the order of transfer by the Commissioner made on 30th December, 1955, the P.I.T.O., on 11th February, 1956, issued a fresh notice under section 34 to the assessee, and in pursuance of that notice, made an assessment on 2nd May, 1956.

Against this assessment dated 2nd May, 1956, there was an appeal to the Appellate Assistant Commissioner challenging the assessment on various grounds, one of which was that the notice dated 11th February, 1956, was invalid, because the proceedings instituted on the notice under section 34 dated 23rd February, 1950, were still pending, and while those proceedings had not terminated, another fresh notice under section 34 could not be validly issued. A further ground was that if the notice dated 23rd February, 1950, is considered as still effective, when the assessment was made on 2nd May, 1956, that assessment was barred by time. These pleas were accepted by the Appellate Assistant Commissioner, but the Income-tax Appellate Tribunal, on appeal, reversed his decision and decided both the points against the assessee and in favour of the Department. On an application under section 66 (1), the Tribunal then referred the following two questions for opinion of the Calcutta High Court :—

“(1) Were the notice under section 34 issued by the Principal Income-tax Officer on 11th February, 1956, and the assessment raised in pursuance thereof, valid in law, in view of the fact that the proceedings commenced by the 8th Additional Income-tax Officer under section 34 on the basis of notice dated 23rd February, 1950, were ‘filed’?”

(2) Whether on the facts and circumstances of the case, the assessment dated 2nd May, 1956, made by the Principal (main) Income-tax Officer, Dist. I (2) was barred by time?”

The High Court disagreed with the view of the Tribunal and held that the notice dated 23rd February, 1950, was valid and proceedings on it were continuing so that the Revenue Authorities could not extend the period of limitation by assessing after the expiry of eight years by issuing a second notice on the eve of the expiry of eight years to obtain a period of one additional year from the date of the service of the second notice. The assessment was, therefore, held to be barred by limitation on the ground that it should have been completed by 31st March, 1956. This appeal has now been brought up to this Court by the Commissioner of Income-tax, Calcutta, on a certificate granted under section 66-A (2) by the High Court.

It appears in this case that at one stage there was a contest between the parties as to whether the notice dated 23rd February, 1950, was validly issued under section 34 or not. Even before the High Court it seems that some attempt was made on behalf of the assessee to raise the question that the notice dated 23rd February, 1950, under section 34 was invalid on the ground that it was issued without completing the assessment on the voluntary returns submitted on 22nd December, 1947 and 31st March, 1949. On behalf of the Commissioner, the contention before the High Court was that on the question referred to the Court it was not open to the assessee to raise this contention. The objection raised by the Commissioner was rightly accepted by the High Court. It is plain from the two questions referred to the High Court that the High Court was not called upon to express any opinion about the validity of the notice dated 23rd February, 1950. The first question referred to the Court—it was not open to the assessee to raise this—whether, in view of the fact that proceedings, commenced by the A.I.T.O. on the basis of notice dated 23rd February, 1950, were merely filed, the notice under section 34 issued by the P.I.T.O. and the assessment based on it were valid in law. The only other question was whether the order of assessment dated 2nd May, 1956, made by the P.I.T.O. was barred by time. Neither of these questions enlarged the scope of the reference before the High Court so as to permit it to examine the validity of the notice dated 23rd February, 1950, and the Court, therefore, was right in refusing to go into this question.

In this appeal, consequently we are only concerned with the correctness of the answer returned by the High Court to the two questions referred to it by the Tribunal.

The answer given by the High Court to the two questions referred to it is clearly based on the view taken by that Court that the order of the A.I.T.O. dated 4th February, 1952, did not terminate or put an end to the proceedings which were going on before him in pursuance of the notice under section 34 dated 23rd February, 1950, and it is the correctness of this view of the High Court that has to be examined.

Learned Solicitor-General, appearing on behalf of the Commissioner, urged before us that in interpreting the effect of the order made by the A.I.T.O. on the 4th February, 1952, we should try to discover what was the real intention of the A.I.T.O. when he ordered that the case is "filed." The intention has to be inferred from all the surrounding circumstances in which the order was made. At the time when this case came up before him on 4th February, 1952, the A.I.T.O. was expecting a return to be filed by the assessee in response to the notice which had been issued by him under section 34. A constituted attorney appeared for the assessee and requested that the return already filed on the 22nd December, 1947 may be treated as the return submitted in response to the notice. The A.I.T.O. noted this fact. Further, it appears that he was already aware that another proceeding on the basis of a voluntary return was pending before the P.I.T.O., and consequently, in his order, he recorded his opinion that the income (referring to the income to which the voluntary return dated 22nd December, 1947, related) should be taken in the assessment of the military contract income for which there was another file. This remark recorded by him in his order gives a clear indication that he felt at that stage that it would not be right for him to continue the proceedings which were pending before him, obviously because another proceeding for assessment of the same assessee was pending before his senior officer, viz., P.I.T.O. He, therefore, ordered the case to be filed. In making this order, the only intention the A.I.T.O. could have was that the proceedings before him should no longer remain in existence as being unnecessary proceedings. The very income which he was called upon to assess to tax was to be taken into account by his senior officer and, therefore, he felt that he should not continue simultaneous proceedings for the same purpose as the proceedings before his senior officer. In ordering that the case be filed, therefore, he clearly intended that the proceedings before him should be terminated or dropped. There is no indication in the order that what the A.I.T.O. intended was that the proceedings before him should continue to remain pending and should be dealt with by him at a subsequent stage. In fact, if the A.I.T.O. had thought that those proceedings before him had to continue and he did not want any conflict with his senior officer, the order that he would have made in the circumstances before him was that these proceedings be also submitted to the P.I.T.O. He seems to have considered it unnecessary to do so, because his opinion was that, in the assessment proceedings going on before the P.I.T.O., the income to which the proceedings before him related would also be included, so that there was no need for any proceedings remaining in existence before him. The intention, thus, clearly was to drop the proceedings and not to continue them any further. Of course, he could have expressed his intention more clearly by saying that he was cancelling the proceedings before him, or was terminating them. We think that the learned Counsel for the Commissioner has rightly contended that, in the circumstances of this case, the word "filed" should be interpreted as being equivalent to "disposed of", so that after that order, no proceedings on the basis of notice dated 23rd February, 1950, remained pending before the A.I.T.O. In effect, therefore, what he did was to terminate the proceedings before him without making any order of assessment, on the ground that the order of assessment in respect of the income in question would be made by the P.I.T.O. in the proceedings before him.

An order in language not contemplated by the Income-tax Act in proceedings on a notice under section 34 (1) came for interpretation before this Court in *Esthuri Aswathiah v. Income-tax Officer, Mysore State*¹. In that case, the assessee had submitted a return showing that he had no assessable income. Thereupon, the

Income-tax Officer made an order "no proceedings." Subsequently, when a notice under section 34 (1) for re-assessment was issued, an objection was taken that the notice was incompetent, because proceedings on the return filed were still pending. This Court held that the submission that the previous return "had not been disposed of" and until the assessment pursuant to that return was made, no notice under section 34 (1) for re-assessment could be issued, had no substance. It was further held that the Income-tax Officer had passed the order "no proceeding" and such an order, in the circumstances of the case, meant that the Income-tax Officer accepted the return and assessed the income as "nil". In that case, thus, the order "no proceedings" was interpreted in the light of the circumstances in which that order was passed. In the case before us, the order directing that the case be filed has to be similarly interpreted in the circumstances in which it was passed; and as we have indicated above, the only proper interpretation is that the A.I.T.O. intended to conclude the proceedings before himself in view of the fact that proceedings were going on before his senior officer.

Our attention was also drawn to a decision of the Calcutta High Court in *Haji Mohamed Mian v. The Commissioner of Income-tax, Calcutta*¹ in which the judgment was delivered on 23rd February, 1965. In that case also, proceedings had begun on the basis of a notice under section 22 (2) of the Income-tax Act, and, at a later stage, the Income-tax Officer ordered that the proceedings be filed on the ground that no return had been filed by the assessee in response to the notice. The order of the Income-tax Officer was interpreted as amounting to dropping of the proceedings, and it was further held that the dropping of the proceedings meant the termination thereof without any order of assessment. In that case also, therefore, the subsequent issue of notice under section 34 was held to be valid and not vitiated on the ground that proceedings for assessment in pursuance of the notice under section 22 (2) were still going on.

Mr. A.K. Sen, on behalf of the assessee, urged before us that once proceedings had been started under section 34 by issue of the notice dated 23rd February, 1950, the proceedings brought into existence could not be dropped, because the scheme of the Income-tax Act is that such proceedings must end in some final order of assessment, even though that order may be to the effect that there is no taxable income and no tax is determined as payable. He relied on a decision of the Bombay High Court in *P.T. Anklesaria and others v. Commissioner of Income-tax, Bombay South*², in which the Income-tax Officer received a voluntary return, though without any notice under section 22 (2), issued a notice under section 23 (2), and again, after obtaining the permission of the Commissioner to issue a notice under section 34, he issued a notice under section 23 (2), and failed to issue any notice under section 34. Thereafter, the Income-tax Officer made the following order:—

"Return has been filed under section 34 claiming a loss of Rs. 74,140 only. Since I find that no income has escaped assessment, proceedings under section 34 are dropped."

In these circumstances, the High Court held that as there was a valid return voluntarily filed by the assessee, the order of the Income-tax Officer was invalid and bad in law. There was no provision by which the Income-tax Officer could refuse to assess the loss shown in the return, especially when he had actually issued a notice under section 23 (2) after the return had been made. It was urged before us that, on the principle laid down in that case, the order made by the A. I. T. O. directing that the case be filed must be held to be an invalid order as it was essential that he should have passed an order assessing the income and then determining the tax payable under section 23, even if the result of the determination was that the tax payable was nil. Even if it be accepted that the order made by the A. I. T. O. in the present case was invalid, its effect cannot be that the proceedings before the A. I. T. O. must be held to have continued after that order was made by him. Even an invalid order terminating proceedings has the effect of terminating them; and in such a case, the appropriate method for correcting the illegality committed is to

1. I.T. Ref. No. 128 of 1961.

2. (1959) 35 I.T.R. 532.

have that order vacated by appellate or other higher authorities having jurisdiction to intervene. As long as the order is not set aside, it remains in force and takes full effect. The order was not totally without jurisdiction; at best, it was an order not contemplated by law and it could not be treated as a non-existent order. In the present case also, the order of the A. I. T. O. directing that the case be filed could have been set right on appeal, or by a reference to the High Court, in case the Tribunal refused to correct it. While it was not set aside, the only conclusion possible is that proceedings before the A.I.T.O. terminated and did not any longer continue to remain pending.

The High Court, in dealing with this question, proceeded on the further basis that when the order of transfer was made by the Commissioner of Income-tax on 30th December, 1955, this proceeding must have been treated as pending, because, otherwise, the order of transfer would not relate to any pending case at all. The High Court held:

"Therefore, when the transfer of the case was made under section 5 (7-A), it cannot be said that the notice issued by the Additional Officer had been wiped out or did not remain alive. If there was no case, there could not be any transfer of the case."

We are unable to accept the view of the High Court that an order of transfer could not have been made unless some specific proceeding for assessment of the assessee to tax was actually pending. The *Explanation* to section 5 (7-A) makes it clear that the word "case" in relation to any person whose name is specified in the order of transfer, means all proceedings under the Act in respect of any year which may be pending on the date of the transfer, and also includes all proceedings under the Act which may be commenced after the date of the transfer in respect of any year. The word "case" is thus used in a comprehensive sense of including both pending proceedings as well as proceedings to be instituted in future. Consequently, an order of transfer can be validly made even if there be no proceedings pending for assessment of tax and the purpose of the transfer may simply be that all future proceedings are to take place before the officer to whom the case of the assessee is transferred. In the present case, the proceedings on the notice dated 23rd February 1950, had already been terminated by the A. I. T. O. by his order directing that the case be filed. Consequently, the effect of the order of transfer was that all the records relating to the assessment of the assessee had to be sent to the P.I.T.O. and this was with the object that, in future, all proceedings relating to assessment of this assessee were to be taken by the P. I. T. O. and not the A. I. T. O. The order does not necessarily indicate that those proceedings which the A. I. T. O. had actually terminated were still to be treated as pending and to stand transferred as pending proceedings.

Since the case of the assessee was transferred to the P. I. T. O. at the stage when no proceeding was pending before the A.I.T.O., the P.I.T.O., became seized of the jurisdiction to take any proceedings against the assessee which the law permitted. It was clearly in exercise of this jurisdiction that the P.I.T.O. issued the subsequent notice dated 11th February, 1956. That notice was, therefore, competently issued by him and was also valid, because it was issued before the expiry of eight years from the end of the relevant assessment year 1947-48. The notice having been issued validly within the period of limitation permitted by section 34 (3) the actual order of assessment could be made validly before the expiry of the period of one year from the date of the notice. The order of assessment dated 2nd May, 1956, was consequently a valid order and was not barred by time.

In the circumstances, the answer returned by the High Court to the two questions referred to it has to be held to be incorrect. Both the questions have to be answered against the assessee and in favour of the Commissioner of Income-tax so that the answer returned by the High Court to the two questions is set aside, the first question is answered in the affirmative, and the second in the negative. The appeal is accordingly allowed with costs in this Court as well as in the High Court.

Income-tax Act (XI of 1922), sections 5 (7-A) and 34—Back assessment—Initiation by and pendency of proceedings before two Officers—Order by one “the case is therefore filed”—Scope of the order—Transfer of case—“Case” includes pending proceedings as well as proceedings to be instituted—No specific case pending—Order of transfer—Valid—Words and Phrases—“Filed”—“Case” ..	245
Income-tax Act (XI of 1922), sections 10 (2) (vi), 10 (5) (b) and 33 (4) and Appellate Tribunal Rules, 1946, rules 12 and 27—Tribunal—Appeal—Powers of remand—Assessee-company registered and carrying on business in former Indian State—Constitution of India—Assessee liable to be assessed as a resident of Part B State—Computation of written-down value and depreciation—Assessment year 1950-51—Appeal by assessee before the Tribunal—Depreciation actually allowed—Taxation Laws Order and Industrial Tax Rules of former State allowing depreciation—Applicability raised by Revenue for the first time before the Tribunal—Power of the Tribunal in entertaining plea and remanding matter back to Officer ..	144
Income-tax Act (XI of 1922), section 10 (2) (vii), second Proviso—Balancing charge—Assessee, a company—Transfer of assets and liability to another company under an agreement—Discharge of liabilities of assessee, cash and shares of the company—Consideration for the transfer—Difference between original cost and written-down value of house property on the date of transfer—Deemed profits—Taxability—Sale, if made in a commercial sense, criterion ..	164
Income-tax Act (XI of 1922), section 10 (2) (xv)—Business expenditure—Hindu undivided family—Karta—Salary or remuneration paid to Karta to manage family business, under a valid agreement—Existence of minor coparceners—Agreement in the interests of the family and for the benefit of minor—Amount allowable as business expenditure ..	169
Income-tax Act (XI of 1922), section 10 (2) (xv)—Business expenditure—Legal expenses—Restrictions in the carrying on of a business—Imposed by legislative or executive act—Legal proceedings to quash act—Expenses—Allowable business expenditure—Expenditure incurred need not be directly to earn income—Persistence in proceedings by filing successive appeals or ultimate failure—Not relevant—Assessee, mills carrying on business—Cotton spinning and weaving—Delivery of yarn, manufactured, to weavers outside for weaving into cloth—Cotton Control Order—Assessee prohibited from delivering yarn to such weavers—Legal proceedings and successive appeals to quash the order—Expenses thereof and costs payable to Government—Permissible business expenditure ..	134
Income-tax Act (XI of 1922), sections 10, 23 (1), (3), (4), (5) (a), 24 (1) first and second Provisos, 24 (2) and Proviso (c) to section 24 (2)—Loss—Carry-forward and set-off Registered firm—Speculation loss—Whether apportionable between partners—Firm whether entitled to carry-forward and set-off ..	148
Income-tax Act (XI of 1922), section 16 (3) (a) (i) and (ii)—Firm—Assessee, his wife and stranger partners—Two minor sons of assessee also admitted to benefits of partnership—Interest on accumulated profits of wife and minor sons—Whether includible in the assessment of the assessee ..	174
Income-tax Act (XI of 1922), section 26-A—Registration of firm—Some partners, creating trust and becoming trustees—Relinquishment of their rights in the assets of firm in favour of trust—Deed of relinquishment not registered—New firm constituted with the trust (represented by trustees) as a partner—Whether legally constituted and entitled to registration ..	177
Income-tax Act (XI of 1922), section 34—Reassessment—Notice—Clause under which notice is issued, whether should be specified—Duty of assessee to disclose material facts—Production of books of accounts or other evidence—Whether sufficient ..	157
Income-tax Act (XI of 1922), section 34—Back assessment—Income-tax Officer—Jurisdiction—Conditions precedent—Reasonable belief of under-assessment—Reasonable belief on the basis of omission or failure of assessee to file return or to disclose fully and truly material facts—Existence of the belief—Open to challenge in civil Court—Sufficiency of the reasons for the belief—Not justiciable—Reasons for the belief, if have a rational connection and relevant bearing to the formation of the belief—Justiciable—Recording reasons for initiation of back assessment proceedings and obtaining sanction of the Commissioner—Administrative and not quasi-judicial—No duty to communicate reasons to assessee ..	161
Income-tax Act (XI of 1922), section 66—Reference—High Court—No power to admit additional evidence ..	164
Interpretation of Statutes—Tax legislation—Retrospective operation—Permissibility—If <i>per se</i> involves contravention of Article 19 (1) (f) or (g) of the Constitution of India ..	234

(Continued at cover page 2)

TABLE OF CASES IN THIS PART

SUPREME COURT OF INDIA

	PAGES.
Associated Clothiers, Ltd. v. C.I.T., Calcutta ..	164
C.I.T., Calcutta v. Bidhu Bhusan Sarkar ..	245
C.I.T. Gujarat, v. Girdhardas & Co. ..	129
C.I.T., Gujarat v. Kantilal Nathiuchand Sami ..	148
C.I.T., Mysore v. Canara Bank Ltd. ..	153
C.I.T., W.B., Calcutta v. Juggilal Kamalapat ..	177
Gupta & Sons v. Damodhar Valley Corporation ..	223
Hukumchand Mills, Ltd. v. C.I.T., Bombay ..	144
M/s. Jalan Trading Co. v. Mill Mazdoor Sabha ..	189
Jawaharmal v. State of Rajasthan ...	234
M/s. Jugal Kishore Baldeo Sahai v. C.I.T., U.P. ..	169
Narayanappa v. C.I.T., Bangalore ..	161
K. V. Narayana & Sons v. First Addl. I.T.O., Rajahmundry ..	157
Ram Chandra Aggarwal v. State of U. P. ..	139
Sree Meenakshi Mills, Ltd., Madurai v. C.I.T., Madras ..	134
Srinivasan v. C.I.T., Madras ..	174
Union of India v. Metal Corpn. of India, Ltd. ..	182

INDEX OF REPORTS

Civil Procedure Code (V of 1908), section 24—Power of transfer—District Judge if can transfer reference by Magistrate to a civil Court under section 146 of the Criminal Procedure Code to another civil Court—Court to which reference is made—If <i>persona designata</i> —Proceeding if writ proceeding to which Civil Procedure Code applies ..	139
Civil Procedure Code (V of 1908), Order 6, rule 17—Suit for mere declaration held to be unsustainable under proviso to section 42, Specific Relief Act (I of 1877)—Amendment including prayer for consequential relief—If can be allowed after it is decreed ..	223
Company—Acquisition of the undertaking by Government—Principles to determine compensation, prescribed by law—Actual cost to company of unused plant, machinery, etc.—Cost less depreciation as 'written-down value' of used machinery—If 'just equivalent'—Judicial security ..	182
Constitution of India, 1950 (as amended by Fourth Amendment Act, 1965), Article 31 (2) ..	182
Constitution of India (1950), Article 255—Act of State Legislature passed without complying with the provisions of Article 255—If can be validated by subsequent legislation ..	234
Income-tax Act (XI of 1922)—Capital receipt or revenue receipt—Banking company having branch in Pakistan—Devaluation of Indian Rupee—Amount belonging to head office lying at branch in Pakistan on date of devaluation—"Blocked" and "sterilised" and not utilised in banking operation—Remittance to India after grant of permission—Profit realised by bank on account of fluctuation in exchange rate—Nature of receipt ..	153
Income-tax Act (XI of 1922), section 2 (6-A), clause (c) (as amended by Finance Act, 1956)—Dividend—Company in liquidation—Accumulated profits existing on date of liquidation—Distribution .. over and above accumulated surplus—Subsequent distributions—Dividend—Whether and to what extent attributable to accumulated profits ..	121

(Continued at cover page 3)

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CONTENTS

	PAGES.
Journal	97—102
Notes of Recent Cases	53—64
Reports	701—860

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CUMULATIVE TABLE OF CASES REPORTED.

PARTS 1—6

	PAGES.
Abdul Karim Khan <i>v.</i> Municipal Committee ..	299
Abdul Waheed Khan <i>v.</i> Bhawani ..	79
I.T. Alaula <i>v.</i> M. Nagjibhai ..	41
All India R.B. Employees' Assn. <i>v.</i> R.B. of India..	338
Amar Singh <i>v.</i> Rana Balbahadur Singh ..	595
Ammathayi <i>v.</i> Kumaresan ..	830
Ananda Nambiar <i>v.</i> Chief Secy., Govt. of Madras ..	272
Associated Clothiers, Ltd. <i>v.</i> C.I.T., Calcutta ..	164
Baborally Sardar <i>v.</i> Corp'n. of Calcutta ..	626
Badaku Joti Svant <i>v.</i> State of Mysore ..	701
Badriprasad <i>v.</i> State of M.P. ..	311
Bahrein Petroleum Co., Ltd. <i>v.</i> P.J. Pappu ..	49
Ballarpur Collieries Co. <i>v.</i> State Industrial Court, Nagpur ..	688
Bapuswami <i>v.</i> Pattay Gounder ..	842
Basant Singh <i>v.</i> Janki Singh ..	476
Bhagwan Das <i>v.</i> State of Punjab ..	783
Bhagwati Prasad <i>v.</i> Chandramaul ..	666
Binayak Swain <i>v.</i> R.C. Panigrahi ..	793
British Paints (India) Ltd. <i>v.</i> Its Workmen ..	789
C.I.T., Bombay <i>v.</i> Smt. K. Walchand Trust ..	429
C.I.T., Bombay City-I <i>v.</i> Godavari Sugar Mills, Ltd ..	329
C.I.T., Calcutta <i>v.</i> Bidhu Bhusan Sarkar ..	245
C.I.T. Gujarat <i>v.</i> Girdhardas & Co. ..	129
C.I.T., Gujarat <i>v.</i> Kantilal Nathuchand Sami ..	148
C.I.T., Madras <i>v.</i> Prithivi Insurance Co., Ltd. ..	400
C.I.T., Madras <i>v.</i> Sri Mecnakshi Mills, Ltd. ..	419
C.I.T., Mysore <i>v.</i> Canara Bank Ltd. ..	153
C.I.T., U.P. <i>v.</i> Nainital Bank, Ltd. ..	76
C.I.T., West Bengal <i>v.</i> East Coast Comm'l. Co., Ltd. ..	433
C.I.T., West Bengal <i>v.</i> Juggilal Kamalapat ..	177
Calcutta Tramways Co., Ltd. <i>v.</i> Corp'n. of Calcutta ..	308
Chandulal Harjiwandas <i>v.</i> C.I.T., Gujarat ..	292
Commr. of W.T. <i>v.</i> Ramaraju Surgical Cotton Mills ..	123
Gumbum Roadways (P.), Ltd. <i>v.</i> Somu Transport (P.), Ltd. ..	31
Dr. S. Dutt <i>v.</i> State of U.P. ..	92
Ellerman & Bucknall Steamship Co. <i>v.</i> S. M. Bherajee ..	443
Erramma <i>v.</i> Veerupana ..	746
Erramma <i>v.</i> Muddappa ..	672
Firm M. R. Mahajan <i>v.</i> Hukumchand Mills, Ltd... ..	472
M/s. O. R. M. SP. SV. Firm <i>v.</i> C.I.T., Madras ..	251
George Da Costa <i>v.</i> Controller of Estate Duty ..	493
Gopalakrishna Pillai <i>v.</i> Meenakshi Ayal ..	450
Gopi Ram <i>v.</i> State of Rajasthan ..	818
Gulabchand <i>v.</i> Kulilal ..	580
Gulam Yasin Khan <i>v.</i> S.Y. Walaskar ..	1
Gupta & Sons <i>v.</i> Damodhar Valley Corporation ..	225
Dr. Guranditta Mal Kapur <i>v.</i> Mahant Ram Saran ..	334
Himmatrao <i>v.</i> Jaikisandas ..	602
Hukumchand Mills, Ltd. <i>v.</i> C.I.T., Bombay ..	144
Indian Chemical & Pharmaceutical Works <i>v.</i> State of A. P. ..	406
Jaganath Singh <i>v.</i> Ramaswamy ..	508
Jagannath Misra <i>v.</i> State of Orissa ..	641
Jagannath Singh <i>v.</i> Krishnamurthy..	474

	PAGES
Jagat Bahadur <i>v.</i> State of M.P.	721
Dr. Jagit Singh <i>v.</i> Giani Kartar Singh	762
Jahiruddin <i>v.</i> K. D. Rathi	749
M/s. Jalan Trading Co. <i>v.</i> Mill Mazdoor Sabha	189
Jammu and Kashmir Bank, Ltd. <i>v.</i> Attar-ul-Nisa	653
Jaora Sugar Mills (P.), Ltd. <i>v.</i> State of M.P.	98
Jawaharmal <i>v.</i> State of Rajasthan	234
Jeevaratnam <i>v.</i> State of Madras	494
Joint Family of Udayan Chinubhai <i>v.</i> C.I.T., Gujarat	323
M/s. Jugal Kishore Baldeo Sahai <i>v.</i> C.I.T., U.P., Lucknow	169
Kamble <i>v.</i> Sholapur Borough Municipality	117
Miss D. D. Kapadia <i>v.</i> C.I.T., Bombay	439
Katra Education Society <i>v.</i> State of U.P.	5
A. Kondayya <i>v.</i> S. Rama Rao	480
Kumaon Motor Owners' Union Ltd. <i>v.</i> State of U.P.	530
Kuppa Goundan <i>v.</i> M. S. P. Rajesh	454
Lakhmi Chand Khemani <i>v.</i> Kauran Devi	738
Lord Krishna Sugar Mills, Ltd. <i>v.</i> Municipal Board, Saharanpur	777
Madappa <i>v.</i> Mahanthadevaru	552
Mahadeo <i>v.</i> Babu Udai Pratap Singh	676
Manikayala Rao <i>v.</i> Narasimhaswami	110
Manujendra Dutt <i>v.</i> P. P. Roy Chowdhury	503
Maqbool Alam Khan <i>v.</i> Mst. Khodaija	63
Martin Burn, Ltd. <i>v.</i> Corpn. of Calcutta	387
Master Construction Co. (P.) Ltd. <i>v.</i> State of Orissa	801
Mervyn Continho <i>v.</i> Collector of Customs	574
Millowners' Association <i>v.</i> Textile Labour Association	360
Modi Sugar Mills Ltd. <i>v.</i> Commr. of Sales Tax	743
Mohammad Bagban <i>v.</i> State of Gujarat	82
Mohd. Idris <i>v.</i> Sat Narain	755
Municipal Board, Hapur <i>v.</i> Raghuvendra Kripal	512
N. B. Nagarsheth <i>v.</i> Gujarat Revenue Tribunal	615
Nalini Dassi <i>v.</i> Kshitish Chandra Hajra	730
K. V. Narayana & Sons <i>v.</i> First Addl. I.T.O., Rajahmundry	157
Narayanappa <i>v.</i> C.I.T., Bangalore	161
Nichhalbhai Vallabhai <i>v.</i> Jaswantlal Zinabhai	106
S. S. Nirmal Chand <i>v.</i> Union of India	267
Orient Paper Mills Ltd. <i>v.</i> Union of India	584
Y.S. Panchaksharamma <i>v.</i> Y. Chinnabbayi	15
Paramananda Mahapatra <i>v.</i> Commr. of H.R.E.	397
M/s. Parekh Wadilal Jivanbhai <i>v.</i> C.I.T., M.P.	662
M. M. Parikh <i>v.</i> Navanagar Transport & Industries Ltd.	285
Pema Chibar <i>v.</i> Union of India	35
Prabhu <i>v.</i> Ramdeo	60
Principal, Patna College, Patna <i>v.</i> K. S. Raman	260
Probhudas Morarjee Rajkotia <i>v.</i> Union of India	52
M. Pullaiah <i>v.</i> M. Narasimham	848
Rajalinga Raja <i>v.</i> State of Madras	320
Ram Chandra Aggarwal <i>v.</i> State of U. P.	139
Ram Kumar Agarwal <i>v.</i> C.I.T., Calcutta	296
Ram Swarup <i>v.</i> Shikar Chand	681
R.M. AR. AR. RM. AR. AR. Ramanathan Chettiar <i>v.</i> C.I.T., Madras	657
V. Ramaraghava Reddy <i>v.</i> K. Seshu Reddy	836
M. Rambhai Patel <i>v.</i> Controller of E.D.	424
Rao Nihalkaran <i>v.</i> Ram Gopal	557
Rohtak & Hissar Elec. Supply Co. <i>v.</i> State of U.P.	587
Roman Catholic Mission <i>v.</i> State of Madras	605
Sarangadeva Periya Matam <i>v.</i> Ramaswami Goundar	734
Saravanabhavan <i>v.</i> State of Madras	629
M/s. R. B. Seth Jessa Ram Fatchchand <i>v.</i> Om Narain Tankha	547

Shivanarayan Kabra v. State of Madras ..	825
Shreevastava v. Mrs. Veena ..	459
Shyam Kishori Devi v. Patna Municipal Corpn. ..	597
Singareni Collieries Co., Ltd. v. Commr. of Comm. Taxes ..	538
Sita Ram v. State of U. P. ..	809
Sree Mecnakshi Mills, Ltd., Madurai v. C.I.T. ..	134
Sri Chand v. M/s. Jagdish Pershad Kishan Chand ..	622
Srinivasa Ayyangar v. Venkatasubrahmanya Iyer ..	67
Srinivasa Reddiar v. Ramaswamy Reddiar ..	645
Srinivasan v. C.I.T., Madras ..	174
S. S. Srivastava v. General Manager, N.E.Ry. ..	797
Standard Mills Co., Ltd. v. C.W.T., Bombay ..	497
State of Gujarat v. M/s. Ananta Mills, Ltd. ..	759
State of Gujarat v. Vinaya Chandra C. L. Pathi ..	821
State of Kerala v. M/s. Ramaswami Iyer & Sons ..	55
State of M. B. v. Hiralal Ji ..	775
State of M. P. v. M/s. Azad Bharat Finance Co. ..	815
State of M. P. v. Col. Lal Rampal Singh ..	413
State of M.P. v. Haji Hasan Dada ..	715
State of M. P. v. Lal Bhargavendra Singh ..	526
State of Madras v. Srinivasan ..	855
State of Maharashtra v. Jugminder Lal ..	718
State of Maharashtra v. Ministerial Services Asson. ..	414
State of Mysore v. M/s. Guduthur Thimmappa & Son ..	812
State of Mysore v. Narayanappa ..	463
State of Mysore v. Padmanabhacharya ..	256
State of Orissa v. Durga Charan Das ..	568
State of Punjab v. Hari Kishan Sharma ..	724
State of U. P. v. Madan Mohan Nagar ..	805
Sukh Lal v. State Bank of India ..	467
N.K.M. Sulaiman Sahib v. M.C.M. Ismail Saheb ..	24
Sundaram Finance Ltd. v. State of Kerala ..	705
Surendra Nath Bibra v. Stephen Court Ltd. ..	12
Tirunagar Panchayat v. Madurai Co-op. H.C. Society ..	845
Travancore Sugars & Chemicals, Ltd. v. C.I.T., Kerala ..	70
Union of India v. Metal Corpn. of India, Ltd. ..	182
Union of India v. Watkins Mayor & Co. ..	304
A. Veeraju v. P. Venkanna ..	17
Workmen of the Bombay Port Trust v. The Trustees of the Port of Bombay ..	692

CUMULATIVE INDEX OF REPORTS.

PARTS 1-6

	PAGES.
Act of State—Portuguese territories acquired by India on 20th December, 1961—Resident who held import licences from Portuguese Government—If entitled to enforce right to import under such licences against Union of India—Refusal to recognise the licences—Petition under 32 of Constitution of India (1950)—If sustainable...	35
Allocated Government Servants (Absorption, Seniority, Pay and Allowances) Rules (1957), Bombay rules 10 and 12—Rule 12 if discriminatory y—Fixation of new scales of pay for allocated Government Servants under rules 10 and 12—If can be fixed to take effect from a date subsequent to 1st November, 1956	414
Andhra Pradesh (Telengana Area) Chloral Hydrate Rules, 1962—If <i>intra vires</i> of the Intoxicating Drugs Act (IV of 1933-F) (as amended in 1953)	406
Andhra Pradesh (Telengana Area) Intoxicating Drugs Act (IV of 1933-F)—If repealed <i>in toto</i> on introduction (in the Hyderabad State) of the two Central Acts (Dangerous Drugs Act (II of 1930) and Drugs Act (XXXIII of 1950)—Amendment thereafter by Hyderabad Act (XXII of 1953)—Validity of	406
Arbitration Act (X of 1940), sections 29 and 30—Award of arbitration—Finality—Arbitrator if can award <i>pendente lite</i> interest	472
Bengal Agricultural Debtors Act (VII of 1936), section 37-A introduced by Act XI of 1942—Agricultural debtor—Mortgage action—Sale of property—Purchase by decree-holder—Provision for delivery back of the property to agricultural debtor—Applies in the case of a <i>bona fide</i> purchaser from auction-purchaser also—Amount of debt—Jurisdiction of the Board under the Act—Jurisdiction—Question to be raised at the earliest stage	730
Bhopal State Land Revenue Act (IV of 1932), section 200 (1)—Scope—Order of Tahsildar under section 71 for ejection of <i>Shikmi</i> at the instance of <i>Khatedar</i> —Suit in civil Court by the person ordered to be ejected claiming to be <i>Khatedar</i> —If barred—Sections, 89, 92, 93 and 95—Effect	79
Bihar and Orissa Municipality Act (VII of 1922), sections 117(1) and 386 (1) (b)—Supersession of a municipality—Effect—Section 117 (1) does not become unworkable—Committee under section 117 could be formed even after supersession—Functions of such committee cannot be directed to be performed by officer nominated under section 386 (1) (b)	597
Bihar and Orissa Municipality Act (VII of 1922), section 107 (1) (c)—Municipal tax—Amendment of assessment list under—Onus of proof	597
Bombay Industrial Relations Act (XI of 1947), sections 42 and 73—Scope of—Award subsisting—No notice of change given by either party—Reference to Industrial Court by the Government—Maintainability—Consumers price Index number—Changes made by Government—Employer paying under the old scheme—‘Industrial dispute’	360
Bombay Personal Inams Abolition Act, 1952 (XLII of 1953), section 17 (5)—Grant of village with exemption of land revenue—Claim for compensation by inamdar for loss of assessment payable by inferior holder arising out of abolition of the inam—If barred by section 17 (5)—Claim for compensation for loss of right of for feiture and reversion—Tenability	615
Bombay Sales Tax (Exemption, Set-off and Composition) Rules (1954), rules 6 (ii) and 12 (1)—Scope—Assessee, manufacturer of cotton textiles, purchasing unginned cotton from unregistered dealers—Paying purchase tax thereon—Unginned cotton ginned and used in manufacture of cotton textiles—Cotton seeds sold—Assessee if entitled to refund, under rule 12 (1), of purchase tax paid	759
Bombay Tenancy and Agricultural Lands Act (LXVII of 1948), sections 31, 88 and 89 (2)—Scope and effect—Lessee from local authority—Interests acquired under Bombay Tenancy Act (XXIX of 1939)—If saved—Effect of section 88	117
Bombay Tenancy and Agricultural Lands Act (LXVII of 1948) (as amended by Act XXXIII of 1952) and XIII of 1956), sections 43-C, proviso 70, 85 and 85-A—Rights conferred by the unamended Act—If extinguished by the amending Acts of 1952 and 1955 (Acts XXXIII of 1952 and XIII of 1956)—Scope and effect of the proviso to section 43-C—Jurisdiction of civil Court to grant possession of land held by a tenant—Application of section 7 of the Bombay General Clauses Act (I of 1904)	41
Calcutta Municipal Act (III of 1923), sections 127, 131, 139 to 142 and 147—“Annual value” of premises let or intended to be let—Determination of—Provision applicable—Appeal to Small Cause Court—Assessment set aside with direction to re-value under section 127 (a)—Appeal to High Court by the Corporation—Order of lower Court maintained but remanded to Small Cause Court itself to re-value under clause (a) of section 127—Validity of remand order	387
Calcutta Thikka Tenancy Act (II of 1949), sections 3 and 29 and Amendment Act (VI of 1953), section 8—Suit for eviction in civil Court transferred to Thikka Controller under section 29—Section deleted by Amendment Act—Jurisdiction of Controller to decide—Bengal General Clauses Act (1899), section 8	503

Calcutta Tramways Act (W.B. Act XXV of 1951), section 5, proviso—Scope—Proper construction	308
Central Excise and Salt Act (I of 1944), sections 19 and 21—Powers of arrest and interrogation conferred on Excise Officer—Excise Officer, if a 'Police Officer' thereby—Admission before such officer—Not hit by section 25 of the Evidence Act (I of 1872)—Admissible in evidence	701
Central Provinces and Berar Industrial Disputes Settlement Act (XXIII of 1947), section 1 (3)—Clause (iii) of the Notification, dated 20th November, 1947 of the State Government issued under, exempting application of C.P. & Berar Act (XXIII of 1947) to "Mines"—Scope of exemption—Head office of a colliery company looking after sale and distribution of the coal extracted from the collieries—If exempted	688
Central Provinces and Berar Industrial Disputes Settlement Act (XXIII of 1947), section 16—Nature of right conferred under—Notification of State Government exempting a textile mill from operation of section 16—Employees of the said mill dismissed while such notification was in force—Exemption withdrawn later—Applications by dismissed employees thereafter under section 16 for reinstatement—Maintainability	749
Central Provinces and Berar Municipalities Act (II of 1922), section 15 (1)—Scope—Election of members to Municipal Committee—Disqualification under section 15 (1) form standing for election—When incurred—Mere relationship of a person with an employee of the Municipal Committee—If sufficient to disqualify him	x
C.P. and Berar Sales Tax Act (XXI of 1947) (before amendment by Act XX of 1953)—Scope—Claim for refund of tax assessed and paid alleged to be in excess of amount due—Assessment order not set aside or modified—If can be entertained by the assessing officer (Assistant Commissioner)	715
Central Sales Tax Act (LXXIV of 1956), section 3—Sales in the course of inter-State trade—Tests	812
Civil Procedure Code (V of 1908), section 2 (16), Order 22, rule 4—Suit and decree against some of the legal representatives—How for binding on the others not impleaded	24
Civil Procedure Code (V of 1908), sections 11 and 144—Application for restitution under section 144—Applicability of principles of <i>res judicata</i>	63
Civil Procedure Code (V of 1908), section 21—Waiver of objection to territorial jurisdiction—Requirements—Application for stay under section 34 of Arbitration Act X of 1940 and appeal under section 39 against order refusing stay—If amounts to conceding jurisdiction of trial Court	49
Civil Procedure Code (V of 1908), section 24—Power of transfer—District Judge if can transfer reference by Magistrate to a civil Court under section 146 of the Criminal Procedure Code to another civil Court—Court to which reference is made—If <i>persona designata</i> —Proceeding if writ proceeding to which Civil Procedure Code applies	139
Civil Procedure Code (V of 1908), section 47 and Order 21, rule 2—Scope of section 47—"Court executing the decree"—Meaning of—Pendency of application for execution of decree by decree-holder—If a condition precedent for exercise of power under section 47—Distinction between section 47 and Order 21, rule 2	459
Civil Procedure Code (V of 1908), section 80 and Order 21, rule 63—Scope and applicability of section 80—Suit under Order 21, rule 63 against Government—Provisions of section 80 if attracted	267
Civil Procedure Code (V of 1908), section 92 (1) (f)—Scope—Powers of trustee or manager to carry on ordinary administration including power to let, sell mortgage or exchange trust property—If circumscribed by section 92 (1) (f)—Scheme settled under section 92 reserving power in trustee or manager to seek directions of Court for disposal or lease of trust property by an application without the necessity of a separate suit—Validity	552
Civil Procedure Code (V of 1908), section 100—Finding of fact binding in Second appeal	602
Civil Procedure Code (V of 1908), section 144—Scope—Plaintiff decree-holder himself purchasing properties sold in execution of an <i>ex parte</i> decree against defendant— <i>Ex parte</i> decree set aside on appeal and case remanded for re-trial—Application by defendant for restitution under section 144—Such application coming for disposal after a fresh decree was passed in favour of plaintiff at re-trial—Defendant if entitled to restitution	793
Civil Procedure Code (V of 1908), Order 6, rule 7—General rule that relief should be founded on pleadings made by parties—When can be departed from—Plaintiff filing suit for ejectment of defendant from his premise on the ground that defendant is his tenant—Court decreeing suit on the ground that defendant is a licensee—Legality	666
Civil Procedure Code (V of 1908), Order 6, rule 17—Suit by Hindu coparcener for partition alleging that there had been severance in status—Mayukha law requiring consent of father who continued joint with his own father and brothers—	

Application to amend plaint by deleting words "and have been" and "and were" from phrases "were and have (been)" and were "and are" members of a joint Hindu family—Right to grant of	106
Civil Procedure Code (V of 1908), Order 6, rule 17—Suit for mere declaration held to be unsustainable under proviso to section 42, Specific Relief Act (I of 1877)—Amendment including prayer for consequential relief—If can be allowed after it is time barred	223
Civil Procedure Code (V of 1908), Order 8, rule 5—Strict rule of pleadings prescribed by—If applies to election proceedings	762
Civil Procedure Code (V of 1908), Order 10—Scope	467
Civil Procedure Code (V of 1908), Order 20, rule 12—Applicability and scope—Plaint valued for possession and past profits—Court-fee paid thereon—Future profits not prayed for—Discretion of Court to order inquiry into future profits.	450
Civil Procedure Code (V of 1908), Order 20, rule 12—Suit for ejectment of defendant from premises of the plaintiff decreed—Claim for future mesne profits must be allowed	666
Civil Procedure Code (V of 1908), Order 21, rules 35 (2) and 96—Execution sale of shares of some members of a joint Hindu family—Order for delivery of a joint possession with members of joint family and publication of such delivery of possession by beat of drum—Effect—If purchaser gets possession—Suit by auction-purchaser for partition—Limitation—Starting point—Limitation Act (IX of 1908), Articles 144 and 120—Applicability	110
Civil Service Regulations (as amended by Uttar Pradesh Government), Article 465—A read with Note (1)—Order of compulsory retirement—If amounts to dismissal—Test	805
Common Carriers—Shipowners—Aware of contract between buyer and seller—Goods to be packed in 'new' fibre drums—Shipment of the goods packed in 'old' drums—Bill of lading merely stating 'goods packed in drums in good order and condition'—Clean bill of lading—At request of and against indemnity given by the seller—Liability in tort (deceit)	443
Company—Acquisition of the undertaking by Government—Principles to determine compensation, prescribed by law—Actual cost to company of unused plant, machinery, etc.—Cost less depreciation as 'written-down value' of used machinery—If 'just equivalent'—Judicial security	182
Company—Sole selling agents, a firm—Security deposit by firm—If held in the nature of a trust—Determination of—Guiding principles	547
Company and shareholders—Corporate personality—Piercing the veil—When permissible	419
Constitution of India (1950), Article 14—Plea of discrimination—Full particulars must be furnished	52
Constitution of India (1950), Article 14—Plea of discrimination—Full particulars must be given	5
Constitution of India (1950), Article 16 (1)—Fixation of seniority of Appraisers and Principal Appraiser by Customs Department—Circular of 1959 by the Government of India—If offends right to equality of opportunity—Petition under Article 32 of the Constitution of India	574
Constitution of India, 1950 (as amended by Fourth Amendment Act, 1965), Article 31 (2)	182
Constitution of India (1950), Articles 77 (2) and 359—Order of President, dated 3rd November, 1962, as amended on 11th November, 1962 and issued under Article 359 (1)—Validity and effect—Petition under Article 32 of the Constitution of India challenging a detention order on ground that rule 30 (1) (b) of the Defence of India Rules (1962) under which the order is made is invalid, or on the ground that the detention order was made <i>malafide</i> —If barred	272
Constitution of India (1950), Articles 79, 85 (1), 86 (1), 100 (1) and 105—Scope	272
Constitution of India (1950), Article 136—Conclusion of Certifying authorities regarding reasonableness of Standing Orders submitted for certification—Correctness of—Cannot be challenged under Article 136	557
Constitution of India (1950), Article 136—Criminal Appeal by Special Leave—Interference with decision of lower Courts—Principles observed for exercise of jurisdiction	629
Constitution of India (1950), Article 136—Election appeals brought to Supreme Court under—Interference with findings of facts recorded by High Court—Practice	762
Constitution of India (1950), Article 136—New plea—Cannot be raised for first time before Supreme Court	812
Constitution of India (1950), Article 136—Party who has not exhausted all his other remedies—If can invoke Article 136	801
Constitution of India (1950), Article 226—Motor Vehicles Act (IV of 1939)—Government Order No. 1298 issued by the Government of Madras relied on by an applicant	

for stage carriage permit before Regional Transport Authority—Said Government Order struck down by Supreme Court during pendency of further proceedings—Applicant if barred from contending in such proceedings that the Government Order is bad—Writ proceedings against order of the State Transport Appellate Tribunal made in appeal—High Court deciding to remand the case—Remand if should be to original or appellate authority—Parties entitled to be heard in such remand..	31
Constitution of India (1950), Article 226—Orders passed by educational authorities under relevant regulations framed by the University—Interference with by High Court in writ petition—Limitations	260
Constitution of India (1950), Article 227—Should be used sparingly ..	12
Constitution of India (1950), Article 255—Act of State Legislature passed without complying with the provisions of Article 255—If can be validated by subsequent legislation	234
Constitution of India (1950), Article 309, Proviso—Scope—Notification, dated 25th March, 1959 made by Mysore Governor under—Validity	256
Constitution of India (1950), Article 311—Applicability	805
Constitution of India (1950), Article 311—Disciplinary proceedings—Reference to Tribunal—Findings against delinquent officer—Compulsory retirement recommended—Notice to show cause—Explanation submitted—Consultation by Government with State Public Service Commission—Order for retirement proper—G. O. No. 902 dated 28th May, 1938, commented upon	855
Constitution of India (1950), Article 311—Dismissal of civil servant with retrospective effect—Validity—Refusal to allow the civil servant concerned to be represented, at the enquiry preceding his dismissal, by a counsel of his own choice—Effect ..	404
Constitution of India (1950), Article 311—Government servant's name included in the panel for promotion to next higher post—Such inclusion stated to be provisional—Subsequent removal of the name of the Government servant from the panel—If amounts to "reduction in rank."	797
Constitution of India (1950), Article 372—Every order made by a former Ruler of Indian State not law—Order, dated 7th March, 1948 of former Ruler of Nagod if law—Alteration made by President of India by his executive order, dated 24th September, 1951—Validity	526
Constitution of India (1950), Article 372—Order of former Ruler of Rewa, dated 3rd April, 1948—If law or a grant—Right of succeeding Government to alter it by an executive order.. ..	413
Constitution of India (1950), section 136—Question not raised before lower Courts—If can be raised before Supreme Court	459
Contract— <i>Pucciadat</i> system of the Bombay market—Incidents—Status of <i>pucca adatia</i> ..	82
Contract Act (IX of 1872), section 72—Banker and Customer—Loan to constituent—Arrangement between banker and third party—Third party to pay amounts in discharge of the loan—Payments so made—Duly credited in the loan account—Claim of double payment by mistake of the third party—Banker if can reverse entries without reference to constituent	653
Contract Act (IX of 1872), section 148—Iron sheets belonging to defendant supplied to plaintiff under a contract by latter to manufacture drums for the defendant—Later contract cancelled—Suit by plaintiff as bailee for compensation for storage of iron sheets in its godown—Measure of—Notice by plaintiff claiming storage charges at certain rate—No reply from defendant—If amounts to implied undertaking to pay godown rent at that rate	304
Contract Act (IX of 1872), section 196—Sale of cut-trees in forest one behalf of Government—Ratification after goods were destroyed by fire—Validity ..	311
Criminal Procedure Code (V of 1898), sections 361 (1), 537 and 239—Contravention of section 361 (1)—But no prejudice caused—Trial not vitiated—Several items of cheating part and parcel of one transaction—Trial on a single charge—Validity..	825
Criminal Procedure Code (V of 1898), section 423—Appellate Court—Powers of—No power to impose punishment higher than the maximum that could have been imposed by trial Court.	721
Criminal Procedure Code (V of 1898), sections 476 and 479-A—Criminal trial before a Criminal Court—Order of acquittal passed—Witness giving false evidence—Not detected by the Court—Subsequent application under section 476—Court finding witness gave false evidence—Written complaint by the Criminal Court to the District Magistrate—Proper—Section 479-A not a bar.. ..	454
Criminal trial—Misappropriation charge—Entries made by accused in a slip of paper together with statement of complainant amounting to admission of guilt—Admissibility of the slip—Admissions made under section 342 of Criminal Procedure Code in another criminal case and application made by accused in another criminal case containing admissions—Admissibility	821
Debtor and creditor—Fiduciary relationship—When arises	547

- ence of India Act (LI of 1962), sections 6 (4), 43, Defence of India Rules, rule 131 (2) (gg) and (i) and Motor Vehicles Act (IV of 1939), section 68-B—Private transport operators in border region—Existence of subversive acts prejudicial to country—Proposal for nationalisation and subsequent dropping—Enemy aggression and invasion—Impugned notification prohibiting private operators and substituting State vehicles in one route—Validity—If *mala fide*—Prohibition of vehicles means prohibition of persons plying vehicles—Overriding effect of section 43 of Act LI of 1962 over Motor Vehicles Act and provisions for compensation—Act IV, of 1939 not made part of Act LI of 1962—Diminishing profit making capacity or reducing to nothing—Validity not affected—Section 44 of Act LI of 1962—Interference with as little as consonant with the ordinary avocation of life and enjoyment of property by the Authority—Person concerned to show contravention .. 530
- Defence of India Rules (1962), Rule 30 (i) (b)—Detention under—Duty of detaining authority to act with full sense of responsibility—Order of detention passed casually on a large number of grounds without proper application of mind—Cannot be sustained .. 641
- Defence of India Rules (1962), Rule 30 (1) (b)—If invalid in so far as it permits a Member of Parliament to be detained .. 27
- Defence of India Rules (1962), rule 30 (1) (b) and 30-A (7)—Order of detention served on detenu while in jail custody—Validity of—Order of Governor that detention be continued—No recital of review by the reviewing authority under rule 30-A (7)—Affidavit proving such review—Detention valid .. 81
- Delhi Rent Control Act (LIX of 1958), sections 2 (1) and 50—Decree in ejectment against a tenant under the previous Delhi and Ajmer Rent Control Act, 1952—Not executable—If still a tenant under section 2 (1)—Civil suit against him for possession—If barred under section 50—Slum Areas (Improvement and Clearance) Act, 1956, section 19 .. 73
- Displaced Persons (Debt Adjustment) Act (LXX of 1951), sections 2 (9) and 2 (10)—Whether a person is a “displaced person”—Determination of—Tests .. 46
- Electricity Act (IX of 1910), section 39—Tampered meter with an exposed stud hole—Meter installed in dark corner—Passage to meter having certain obstructions—These facts if sufficient for conviction under section 39 .. 47
- Electricity Act (IX of 1910), sections 44 and 39—Conviction under—Necessary ingredients—Nature of evidence required—Meter in the custody of consumer found with an exposed stud hole on the meter cover—If sufficient for convicting consumer under sections 39 and 44 respectively .. 50
- Electricity Rules (1956), Rules 56 (2) and 138 (b)—Breakage of seal affixed to meter—Consumer's liability for—Scope and extent of .. 50
- Estate Duty Act (XXXIV of 1953), sections 5 and 23—Estate duty—Property passing—Deed of settlement—Shares in a company—Settlement on son subject to conditions, terms and limitations—Death of son—Interest in possession or interests in expectancy .. 42
- Estate Duty Act (XXXIV of 1953), section 10—Estate duty—Gift—*Bona fide* assumption of possession and enjoyment by donee to the exclusion of donor—Retention of such possession and enjoyment by donee to the exclusion of donor or of any benefit “by contract or otherwise—Conditions cumulative for excluding property passing on death—“By contract or otherwise”—Do not qualify words “to the entire exclusion of donor”—“Otherwise”—To be construed *ejusdem generis*—Legal obligation or transaction enforceable at law or in equity—Continuance of residence of donor in gifted house on the basis of filial affection—No entire exclusion of donor—Gift of house by father to sons—Continued residence of father in the house until death—Gift liable to estate duty .. 49
- Evidence—Secondary evidence—Copies of original documents—Admissibility .. 60
- Evidence Act (I of 1872), section 3—“*Proved*”, “*disproved*” and “*not proved*”—Construction—Standard of proof in civil cases as distinguished from proof in criminal cases—Fraudulent or criminal act alleged in a civil case—Standard of proof required .. 58
- Evidence Act (I of 1872), section 17—Statements in plaint signed and verified by plaintiff—Admissions under the section—Evidence against him in subsequent litigations—Evidentiary value of such admission .. 47
- Evidence Act (I of 1872), section 25—Confession in a letter addressed to Sub-Inspector—If made to a Police Officer—Admissibility .. 80
- Evidence Act (I of 1872), section 45—Handwriting of a person—Proof—Examination of a handwriting expert if a *sine qua non* .. 82
- Evidence Act (I of 1872), section 112—Scope and effect .. 83
- Evidence Act (I of 1872), section 116—Limitation Act (IX of 1908), section 28 and Article 144—Tenancy from year to year of lands belonging to a Hindu deity granted by its manager—If terminates with the expiry of office of such manager—Tenant if can, during continuance of the tenancy, acquire absolute title or permanent right of occupancy by prescription .. 17

Family arrangement—What constitutes—Two brothers—Agreement in writing allotting 3 shares to one and 2 shares to the other in partition—Not registered—Partition in future contemplated—Validity—Registration Act (XVI of 1908), section 17 (1) (b)	848
Forward Contracts (Regulation) Act (LXXIV of 1952), sections 2 (c) and 15—Scope—Speculative contracts—If falls within the purview of the Act	825
Government of India (Construction of Orissa) Order (1936), section 23 (2)—Rules framed under, for the protection of members of a Provincial or Subordinate service required to serve in or in connection with the affairs of Orissa, Rule 6—Protection granted under—Scope of—If takes within its sweep claim for promotion to higher posts—Pension payable to public servant transferred to Orissa—Fixation of—Relevant considerations—Rules for promotion to the post of Registrar in Bihar and Orissa respectively—If different as to cause prejudice to employee transferred to Orissa	568
Government Order (Mysore) No. GAD 46 SRR, dated 22nd September, 1961, clause 2 (i) to (iv)—Proper construction.	463
Gujarat Agricultural Produce Markets Act (XX of 1964)—Validity—If infringes Articles 14, 19 and 31 of the Constitution—Declaration of emergency by the President—Effect on right to enforce the fundamental rights under Article 19	82
Hindu Law—Adoption—Proof—Evidence of members of family of party setting up adoption—Credibility	672
Hindu Law—Joint family—Gift—Power to gift away ancestral movable or immovable properties—Limitations—Gift by husband to wife of immovable ancestral property—Validity—If becomes valid if made to carry out wishes of the father of the husband—Father-in-law's power to gift ancestral immovable property to daughter-in-law	830
Hindu law—Religious endowment—Lease of lands belonging to deity—Tenancy if intended to be permanent—Considerations—Tenant deliberately withholding the Sanad by which the tenancy was created—Presumption	17
Hindu Succession Act (XXX of 1956), section 8—Male Hindu dying intestate before the commencement of the Act—Section not retrospective—Inapplicable to a case of succession opening before the Act—Section 14—Property possessed by a female Hindu—Property with some kind of title contemplated—No conferment of title in case no title was possessed—Hindu male dying leaving wives—Hindu Women's Right to Property Act of 1937, not in operation then—Possession of widow as against the adopted son of another wife—No enlargement of estate—Trespasser	746
Hindu undivided family—Partition between groups of members of family—Whether can be recognised by Income-tax Officer—Partition between G and his wife and sons—Wife and sons forming one group—Share allotted to wife and sons remaining undivided—Order recording partition—Wife and sons whether constitute Hindu undivided family and assessable in that status.	323
Hyderabad Sales Tax Act (XIV of 1950), section 2 (k)—Coal Control Order, 1945—Coal supplied under authorisation of the Coal Commissioner to allottees resident outside the State—Turnover, if liable to sales tax under the Act—Constitution of India (1950), Article 286 (1) (a), <i>Explanation</i> —Effect of—Central Sales Tax Act (LXXIV of 1956), section 3	538
Imports and Exports (Control) Act (XVIII of 1947)—Imports (Control) Order (1955)—Special Exports Promotion Scheme for Engineering Goods (1963), Para 5.4—Grant of import licences under—Value for which it could be granted—Determination—Powers of licensing authority	52
Inam—Nature—Depends on sanad	615
Inam Fair Register—Evidentiary value—Is an 'act of State'—Declarations therein have supreme importance	605
Inam grants—Kinds of—On evidence held <i>inam</i> comprised only <i>melwaram</i> and was for remuneration of <i>archaka</i> service of temple—Was therefore liable for resumption under section 44-B of Madras Hindu Religious Endowments Act (II of 1927) on its alienation	605
Income-tax Act (XI of 1922)—Capital receipt or revenue receipt—Banking company having branch in Pakistan—Devaluation of Indian Rupee—Amount belonging to head office lying at branch in Pakistan on date of devaluation—"Blocked" and "sterilised" and not utilised in banking operation—Remittance to India after grant of permission—Profit realised by bank on account of fluctuation in exchange rate—Nature of receipt	153
Income-tax Act (XI of 1922)—Income—Interest—Capital receipt or revenue receipt—If a casual and non-recurring nature—Estate duty wrongly collected from assessee—Proceedings for recovery in Court—Refund directed with interest on the amount—Receipt of interest—Statute awarding interest—Words "interest" in contrast to "principal sum adjudged" used—Revenue receipt and assessable under the Act—Non-recurring receipt—Lump sum payment on account of interest—Award under the decree from the date of institution of proceedings—Calculated as accruing <i>de die in diem</i> —Essential quality of recurrence borne—Casual receipt—Interest foreseen and anticipated—Not casual receipt even if not likely recur again	567

	PAGES.
Income-tax Act (XI of 1922), section 2 (6-A), clause (c) (as amended by Finance Act, 1956)—Dividend—Company in liquidation—Accumulated profits existing on date of liquidation—Distribution by liquidator—Amount over and above accumulated surplus—Subsequent distributions—If deemed dividend—Whether and to what extent attributable to accumulated profits	129
Income-tax Act (XI of 1922), section 4 (3) (i)—Trust—Income—Exemption—Trust, the assessee—Died of trust—Right of the settlor to receive income for life and right of residence in certain property—Trusts to apply income for public charities after death of settlor—Relinquishment by settlor or rights under the deed to trustees—Extinguishment of rights under a valid surrender—Right to apply income or accumulate income for charitable purposes accruing to trust—Exemption	429
Income-tax Act (XI of 1922), section 4 (3) (vii)—Adventure in the nature of trade—Assessee, a firm of sharebrokers—Joint negotiations to purchase controlling interest in a company—Subsequent agreement with rival purchaser to secure and transfer controlling interest—Amount received from rival purchaser on completion of transaction—Whether revenue receipt or non-recurring casual receipt	296
Income-tax Act (XI of 1922), sections 4 and 42 (1)—Income—Deemed accrual within taxable territories—Money lent at interest outside taxable territories—Taking such money into taxable territory—Knowledge of lender and borrower—To be an integral part of the transaction—Assessee-companies and a bank having branches within and without taxable territories—Same director in the two entities, occupying a special position—Profits of assessee outside taxable territory deposited in branch of the bank outside taxable territory—Borrowal by assessee from the bank situate within taxable territory on such deposits—Transmission of funds—Assessee a major shareholder in the bank—Knowledge of arrangement or scheme—Assessability of interest	419
Income-tax Act (XI of 1922), sections 5 (7-A) and 34—Back assessment—Initiation by and pendency of proceedings before two Officers—Order by one "the case is therefore filed"—Scope of the order—Transfer of case—"Case" includes pending proceedings as well as proceedings to be instituted—No specific case pending—Order of transfer—Valid—Words and Phrases—"Filed"—"Case"	245
Income-tax Act (XI of 1922), sections 10 (2) (vi), 10 (5) (b) and 33 (4) and Appellate Tribunal Rules, 1946, rules 12 and 27—Tribunal—Appeal—Powers of remand—Assessee-company registered and carrying on business in former Indian State—Constitution of India—Assessee liable to be assessed as a resident, of Part B State—Computation of written-down value and depreciation—Assessment year 1950-51—Appeal by assessee before the Tribunal—Depreciation actually allowed—Taxation Laws Order and Industrial Tax Rules of former State allowing depreciation—Applicability raised by Revenue for the first time before the Tribunal—Power of the Tribunal in entertaining plea and remanding matter back to Officer	144
Income-tax Act (XI of 1922), section 10 (2) (vii), second Proviso—Balancing charge—Assessee, a company—Transfer of assets and liability to another company under an agreement—Discharge of liabilities of assessee, cash and shares of the company—Consideration for the transfer—Difference between original cost and written-down value of house property on the date of transfer—Deemed profits—Taxability—Sale, if made in a commercial sense, criterion	164
Income-tax Act (XI of 1922), section 10 (2) (xv)—Business expenditure—Hindu undivided family—Karta—Salary or remuneration paid to Karta to manage family business, under a valid agreement—Existence of minor coparceners—Agreement in the interests of the family and for the benefit of minor—Amount allowable as business expenditure	169
Income-tax Act (XI of 1922), section 10 (2) (xv)—Business expenditure—Legal expenses—Restrictions in the carrying on of a business—Imposed by legislative or executive act—Legal proceedings to quash act—Expenses—Allowable business expenditure—Expenditure incurred need not be directly to earn income—Persistence in proceedings by filing successive appeals or ultimate failure—Not relevant—Assessee, mills carrying on business—Cotton spinning and weaving—Delivery of yarn, manufactured, to weavers outside for weaving into cloth—Cotton Control Order—Assessee prohibited from delivering yarn to such weavers—Legal proceedings and successive appeals to quash the order—Expenses thereof and costs payable to Government—Permissible business expenditure	134
Income-tax Act (XI of 1922), section 10 (2) (xv)—Business expenditure—Loss in dacoity—Assessee, a bank—Advances on pledge of jewellery—Theft of jewellery in a dacoity—Settlement between assessee and constituents—Excess of market value on jewels over amounts due by constituents—Payment by assessee—Expenditure—Allowable as business expenditure—Settlement, bilateral—Not merely forbearance to enforce claim—Mere forbearance to enforce claim—If an expenditure	67
Income-tax Act (XI of 1922), section 10 (2) (xv)—Capital or revenue expenditure—Assessee, a company—Assets of another company in winding up and with largest Government shareholding and two other Government factories taken over under an agreement—Provision for cash consideration for sale—Percentage of profits also to be paid to Government—Payment for an indefinite period related to annual profits and not to any capital value and not as part of the purchase price—Revenue expenditure	

Income-tax Act (XI of 1922), sections 10, 23 (1), (3), (4), (5) (a), 24 (1) first and second Provisos, 24 (2) and Proviso (c) to section 24 (2)—Loss—Carry-forward and set-off—Registered firm—Speculation loss—Whether apportionable between partners—Firm, whether entitled to carry-forward and set-off	148
Income-tax Act (XI of 1922), section 12-B (ii)—Capital gain—Sale of shares—Deductions in computation—Assessee holding shares in a company as an investment—Allotment by company of an equal number of new shares to assessee—Right to take or renounce new shares—Sale of new shares by assessee at a falling market rate—Net capital gain—Deduction of loss incurred simultaneously in the original shares as a result of depreciation in value—Valuation of right to receive new shares issued by company—Applicability of principles of accountancy—Part of commercial practice—Test of ordinary man of business for business purposes	439
Income-tax Act (XI of 1922), section 15(1)—Exemption—Life insurance—"Children's Deferred Endowment Assurance"—Policy on minor's life taken by father—Premium paid out of minor's taxable income—Rebate, whether admissible in minor's assessment	292
Income-tax Act (XI of 1922), section 16 (3) (a) (i) and (ii)—Firm—Assessee, his wife and stranger partners—Two minor sons of assessee also admitted to benefits of partnership—Interest on accumulated profits of wife and minor sons—Whether includible in the assessment of the assessee	174
Income-tax Act (XI of 1922), section 23-A—Deemed dividend—Dividend declared at Annual General Meeting—Maximum permitted under law then in force—Subsequent repeal of that law within six months of the meeting—Order of deemed distribution—Invalid	329
Income-tax Act (XI of 1922), section 23-A—Distribution order—Assessee-company—Members of a family holding seventy-five per cent. of shareholding—Public if substantially interested—Existence of an individual or group which can control voting power as a block—Exercise of a controlling interest over the affairs of the company by a block—Requisites—Concerted action by the block—Inference from facts—No insistence of actual evidence of concerted action—Evidence—Revenue—Not bound by rules of evidence—Investigation—Commission—Report—Evidentiary value	433
Income-tax Act (XI of 1922), section 23-A (after amendment in 1955) and section 34(3)—Undistributed income—Profits of company—Declaration of dividend below statutory percentage—Order imposing additional super-tax under section 23-A—Whether an order of assessment—Bar of limitation under section 34 (3)—Whether applies to such an order	285
Income-tax Act (XI of 1922), section 24(2)—Loss—Set-off—Same business—Criterion—Inter-connection, interlacing, interdependence and unity—Closure of one business without affecting the other business—Not a decisive test—Assessee a company carrying on life insurance and general insurance business—Allowed under the memorandum of association—Common administrative organisation and common expenses—Loss in life business against profits in general business—Set-off—Allowable—Same business	400
Income-tax Act (XI of 1922), section 25—Discontinuance—Business charged to tax under the 1918 Act—Exemption—Assessee, firm—Business in India and outside India—Profits of foreign business—Receipt—Taxed under the 1918 Act—Dis-solution of firm—Foreign business and rental income from houses owned by foreign firm—Relief on discontinuance—Allowable—Receipt of income derived from foreign business—Charge under the 1918 Act—Amounts to assessment on foreign business—Business, profession or vocation—Not a unit of assessment—Charge on the owner of the business—Exemption on discontinuance—General—Not restricted to the head "profits and gain of business"—Division into various heads only for computation—Rental income from property owned by foreign firm—Relief on discontinuance—Tenable	251
Income-tax Act (XI of 1922), sections 25-A, 34—Re-assessment—Partition of Hindu undivided family—Order recognising partition—Re-assessment proceedings ignoring such order—Validity—Nature of order recording partition	323
Income-tax Act (XI of 1922), section 26-A—Registration of firm—Application for registration—Strict conformity with the Act and Rules essential—Deed of partnership—To be ascertained reasonably in ascertaining such conformity—Provision in the deed—Allotment of equal shares in capital—Net profits or loss to be divided equally—Equal division of profits shown in the prior application for registration—Equal division shown in the books of account—Registration to be allowed	662
Income-tax Act (XI of 1922), section 26-A—Registration of firm—Some partners, creating trust and becoming trustees—Relinquishment of their rights in the assets of firm in favour of trust—Deed of relinquishment not registered—New firm constituted with the trust (represented by trustees) as a partner—Whether legally constituted and entitled to registration	177
Income-tax Act (XI of 1922), section 34—Back assessment—Income-tax Officer—Jurisdiction—Conditions precedent—Reasonable belief of under-assessment—Reasonable belief on the basis of omission or failure of assessee to file return or to	

disclose fully and truly material facts—Existence of the belief—Open to challenge in civil Court—Sufficiency of the reasons for the belief—Not justiciable—Reasons for the belief, if have a rational connection and relevant bearing to the formation of the belief—Justiciable—Recording reasons for initiation of back assessment proceedings and obtaining sanction of the Commissioner—Administrative and not quasi-judicial—No duty to communicate reasons to assessee ..	161
Income-tax Act (XI of 1922), section 34—Reassessment—Notice—Clause under which notice is issued, whether should be specified—Duty of assessee to disclose material facts—Production of books of accounts or other evidence—Whether sufficient ..	157
Income-tax Act (XI of 1922), section 66—Reference—High Court—No power to admit additional evidence ..	164
Industrial Dispute—Age of retirement—Distinction between clerical and subordinate staff and workmen in factory—Gratuity scheme (Provident fund scheme already existing)—Minimum period of service—Quantum—Basis of—Basic wage or wage and dearness allowance together ..	789
Industrial dispute—Minimum wage, fair wage and living wage—Meaning of—Fixation of minimum wage for workers in Reserve Bank of India—Acceptance of norms laid down in the Resolution adopted by the Fifteenth Indian Labour Conference—Practicability—Wages of middle class staff in relation to wages of working classes—Determination—Proper co-efficient ..	338
Industrial Dispute—Promotion—Seniority and merit should both have a part—Gratuity—Forfeiture of on dismissal—Legality—Fixation of period for confirmation and probation—No hard and fast rule can be laid down—Claim by union that it should be allowed to participate in disputes between an individual workman and the management—Tenability ..	338
Industrial Disputes Act (XIV of 1947) (as amended in 1956), sections 2 (k), 2 (s) (iv) and 10 (1-A)—Supervisor when ceases to be a workman under section 2 (s) (iv)—Word "Supervise" and its derivatives—Meaning of—Class II staff of Reserve Bank of India if employed in supervisory capacity—Reference under section 10 (1-A) of dispute in regard to supervisors drawing less than Rs. 500 per month but on scales carrying them beyond Rs. 500—If without jurisdiction—Industrial dispute by whom can be raised—If can be raised on behalf of non-workmen ..	338
Industrial Disputes Act (XIV of 1947), section 17-A—Industrial award—When comes into operation—Discretion of Tribunal to fix commencement date—Interference by Supreme Court—Practice ..	338
Industrial Disputes Act (XIV of 1947), as amended by Act (XXXVI of 1964), section 25-J—U.P. Industrial Disputes Act (XXVIII of 1947), sections 6-K and 6-R—Respective scope and applicability—Industrial establishment in U.P.—If governed by the Central Act or U.P. Act in the matter of payment of compensation for lay-off ..	557
Industrial Employment (Standing Orders) Act (XX of 1946), as amended by Act (XXXVI of 1956)—Scheme of Act—Certification of Standing Orders—Jurisdiction of Certifying authority—If can consider fairness and reasonableness of Standing Orders submitted for certification—Consent of employees—If conclusive test of reasonableness—Matters that can be covered—Departure from model Standing Orders—Permissibility—Addition of Items 11-B and 11-C to the Schedule of the Act by U.P. Legislature—Validity—Scope of Item 11-C—Provision in Standing Order as to age of retirement without a retrial benefit—Reasonableness—Closure of establishment due to sudden fire, break down of machinery or power, epidemic, etc.—Standing order requiring 2 days notice of such closure or two days' pay—Validity ..	557
Industrial Employment (Standing Orders) Act (XX of 1946), as amended by Act (XXXVI of 1956)—Standing Orders resulting in appeals to outside authorities—Permissibility under the Act ..	557
Interest Act (XXXII of 1839)—Suit for compensation—Interest for the period prior to institution of the suit—When can be awarded ..	304
Interpretation of Statutes—Construction of statute to make it workable to be preferred ..	597
Interpretation of Statutes—Overriding clause contained in two Acts—Construction—Date of enactment objects and language, criterion, section 43 of Defence of India Act and section 68-B of Motor Vehicles Act ..	530
Interpretation of Statutes—'Proviso' unrelated to the main enactment ..	41
Interpretation of Statutes—'Shall' meaning of ..	815
Interpretation of Statutes—Tax legislation—Retrospective operation—Permissibility—If <i>per se</i> involves contravention of Article 19 (1) (f) or (g) of the Constitution of India ..	234
Landlord and tenant—Landlord not putting tenant in possession of portion of premises—Liability for rent—Doctrine of suspension of rent—Applicability in India ..	12
Landlord and tenant—Tenancy granted by a written instrument or a tenancy whose origin is not known—Question whether the tenancy is permanent—Determination of—Relevant factors ..	17

Legal Representatives—Representation—Decree properly obtained against some only of legal representatives—Binding nature on heirs not impleaded—Death of debtor after suit—Suit against legal representatives—Continuation or institution of suit after diligent and <i>bona fide</i> enquiry against some only of the legal representatives of deceased debtor—Heirs not impleaded, bound by the decree—Existence of fraud, collusion or other vitiating factors, and special defence open to the non-impleaded heir—Open to investigation by Court—Binding nature of decree—Question depends not on personal law but on law of procedure—Practice ..	24
Limitation Act—Imposition of assessment on lands liable to be assessed—No period of limitation	605
Limitation Act (IX of 1908), section 28 and Article 144—Perpetual lease, without legal necessity, of properties belonging to a math by its matadhipathi—Lessee ceasing to pay rent after the death of the matadhipathi granting the lease and possessing the demised properties on his own behalf—Adverse possession against the math when commences—If commences only from the date of appointment of a successor matadhipathi	734
Limitation Act (IX of 1908), Articles 61 and 120—Contract by plaintiff to manufacture finished product out of raw materials supplied by defendant—Raw materials stocked in plaintiff's godown—Later contract cancelled—Suit by plaintiff claiming compensation as bailee for storage and other incidental charges—If governed by Article 61 or 120—Claim under different heads if can be split up for the purpose of applying the bar of limitation	304
Limitation Act (IX of 1908), Article 134-B—Applicability—Endowed property—Alienation by service-holder in possession and enjoyment— <i>Qua</i> owners subject to an obligation—Alienors leaving the village after disposal of all the properties— <i>De facto</i> trustees in management of temple and matam for over 25 years— <i>De jure</i> trustees appointed later by the Deputy Commissioner of Hindu Religious and Charitable Endowments—Right to recover possession if barred	645
Limitation Act (IX of 1908), Articles 134-B and 139—Scope and applicability of Article 134-B—Lease from year to year of lands belonging to a Hindu deity lawfully granted by its manager—Succeeding manager terminating tenancy and filing suit for recovery of the lands—Suit if governed by Article 134-B or 139	17
Limitation Act (IX of 1908), Article 144—Land leased to an Akhara—Unauthorised sub-lease by Mahant of Akhara—Landlord obtaining possession of such land under a decree for ejectment—Suit by succeeding Mahant for recovery of possession of the land—Limitation	334
Madhya Bharat Sales Tax Act (XXX of 1950), Notification No. 58 under the Act, Item No. 39—Purchase by assessee of scrap iron locally and import of iron plates from outside—Sale after conversion into bars, flats, and plates—Exempt from sales tax under the Notification—Distinction between sale of raw materials and goods prepared from such raw materials	775
Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act (I of 1951), sections 3 and 4—Suit for partition of his share by co-sharer in an Izara village instituted before the Act—If becomes infructuous after the commencement of the Act	602
Madhya Pradesh Land Revenue Code (XX of 1959), sections 185 (1) (ii) (a), 261 and 262 (2)—Expression “tenant” in section 185 (1) (ii) (a)—Meaning of—A person whose tenancy rights were determined and against whom ejectment proceedings were initiated before the commencement of the Code—If can acquire occupancy rights under section 185 (1) (ii) (a)—Scope of section 261 and 262 (2)	588
Madhya Pradesh Land Revenue Code (XX of 1959), sections 185 (3) and 168 (2)—Scope and applicability of section 185 (3)—Exception under section 185 (3)—When attracted	595
Madhya Pradesh Public Trust Act (XXX of 1951), sections 4, 5 and 8 (1) and 9—Scope—Property registered under the Act as belonging to a public trust—Effect—If conclusive against a person claiming title to the same—Scope of enquiry under section 5—Section 8 (1) by whom can be invoked	299
Madras Agriculturists Relief Act (IV of 1938), as amended by Madras Act (XXIV of 1950), section 8 <i>Explanation III</i> —Scope—Benefit of <i>Explanation III</i> —When can be availed of	67
Madras Estates Land Act (I of 1908), section 3 (2) (d), <i>Explanation</i> added by Act II of 1945—Inam grant—Whether an ‘estate’—Grant, if expressed to be of a named village—Burden on person claiming to bring the grant within the exception—Presumption of an ‘estate’ arises on such proof—Non-inclusion of lands already granted or reserved for communal purposes—Not conditions for raising of such presumption—Presumption, rebuttable by other facts, but not by facts in the <i>non-obstante</i> clause—Presumption before and after the Amendment Act XVIII of 1936	480
Madras General Sales Tax (Turnover and Assessment) Rules (1939), Rules 4-A (iv) (b)—Scope—Tax under, when attracted	812

	PAGES
Madras Hindu Religious Endowments Act (II of 1927), sections 6 (17) and 84 (2)— Order of Endowments Board declaring a temple 'public temple'—Petition to set aside the order—Scope of—Compromise—Deity if represented by the Commissioner— respondent—Decree if binding on deity	836
Madras Hindu Religious Endowments Act (II of 1927), as amended by Madras Acts (XI of 1934) and (X of 1946), section 44-B—Validity	605
Madras Plantations Agricultural Income-tax Act (V of 1955), sections 3, 4, 65— Scope—Agricultural income-tax—Sale of produce of earlier years in the year of account—Income derived, whether exempt—Tax for those years paid after composition—Produce of those years, whether had suffered tax	320
Madras Village Panchayats Act (X of 1950), section 58—Scope—Parks, playgrounds, schools club, etc.—Amenities to residents of village by House Construction Society —If vest in the Panchayat of the village	845
Metal Corporation India (Acquisition of Undertaking) Act (XLIV of 1965), section 10 and Schedule, Paragraph II (b).	182
Minimum Wages Act (XI of 1948), sections 13 and 14—Minimum Wages (Central) Rules (1950), rules 24 and 25—Scheme of sections 13 and 14 read with rules 24 and 25—Break up of 12 hours' shift at Prince's and Victoria Docks of the Bombay Port Trust into 8 hours' duty, 2 hours' variable recess and 2 hours' overtime—If infringes the Minimum Wages Act or the Rules made thereunder	692
Muhammadan law—Gift—Necessary conditions for validity of—Gift of property in the possession of a trespasser—Validity—Suit by plaintiff to recover property in the pos- session of defendant—Oral gift by plaintiff of suit property during pendency of— Plaintiff dying thereafter—Donee if can claim the property by virtue of the gift	63
Municipality—Rules on Tolls in force in the Municipal Area of Saharanpur (1949) before Amendment on 7th September, 1955), rule 8 (a)—Toll tax payable on entry of goods within municipal limits—Exemption from under rule 8 (a) as being meant for immediate export—When can be claimed—Goods entering municipal limits passing out of export barrier and unloaded at railway station of Saharanpur for being exported by rail—Railway station situated beyond export barrier but within municipal limits—Such goods if entitled to exemption under rule 8 (a)	777
Mysore Hindu Law Women's Rights Act (X of 1933), section 9 (1)—Hindu widow's right to adopt—Normal presumption is in favour of existence of such a right— Circumstances rebutting such presumption	672
Mysore Service Regulations as amended on 29th April, 1955, Rule 294 (a) note 4— Construction—Trained teachers in the Education Department—Age of retirement	256
Opium Act (I of 1878), as amended by Opium (Madhya Bharat Amendment) Act (XV of 1955), section 11—Provisions if mandatory	815
Orissa Hindu Religious Endowment Act (IV of 1939), section 64 (2)—Suit by person claiming a temple to be a private temple for setting aside order of Commissioner in proceedings under section 64 (2) declaring the temple as public excepted temple —Public if should be impleaded as party to suit—Order 1, rule 8 of the Civil Procedure Code (V of 1908), if applicable of such suit	397
Orissa Sales Tax Rules (1947), rule 83—Scope of jurisdiction of Commissioner of Sales Tax under	801
Patna University Act (Bihar Act XXV of 1951), section 34 (b)—Regulation 4 of the Regulations framed in 1961 by the Academic Council of the Patna University under—Regulation 4 requiring 75 per cent. attendance in lectures, tutorials and/or practicals for eligibility for appearance in University examination—If postulates 75 per cent. attendance at lectures, tutorials and/or practicals severally or conjointly	260
Payment of Bonus Act (XXI of 1965), sections 10, 32, 33, 34 (2), 36 and 37—Constitu- tional validity—Act not invalid as amounting to fraud on Constitution or colour- able piece of legislation—Section 36 valid—Section 10 providing for minimum bonus irrespective of profits—Does not infringe Article 14 or 31 of the Constitution of India and is valid—Section 37 invalid—Suffers from vice of delegation of legis- lative power—Sections 33 and 34 (2) void as offending Article 14 of the Constitution —Invalidity of sections 33, 34 (2) and 37 does not affect rest of the Act.	189
Penal Code (XLV of 1860), sections 193 and 471—Offence under section 193—Court refusing to accord sanction to prosecute under section 195, Criminal Procedure Code (V of 1898)—Prosecution for offence under section 471—Sustainability	92
Penal Code (XLV of 1860), section 302—Offence of murder—Circumstantial evidence —Conviction based on	809
Penal Code (XLV of 1860), section 420—Conviction under—False pretence in express words not necessary	825
Practice—Appeal to Supreme Court by Special Leave—Concurrent findings of fact— If can be questioned	809
Practice—Finding of High Court based on appreciation of evidence—Interference with by Supreme Court	721
Practice—Second Appeal—Concurrent finding of fact—No power to interfere	842

Prevention of Food Adulteration Act (XXXVII of 1954), sections 7 (1), 16 (1) (a) and 19 (2)—Prevention of Food Adulteration Rules (1955), Rules 12-A and 42-B (b)—Exposure for sale of adulterated condensed milk—Defence under section 19 (2)—Conditions to be fulfilled	626
Public Companies (Limitation of Dividends) Ordinance (XXIX of 1948), sections 3 and 12 and Public Companies (Limitation of Dividends) Act (XXX of 1949), section 13	329
Punjab Cinemas (Regulation) Act (XI of 1952), section 5 (2) corresponding to Cinema Regulations Act (Central) (XXXVII of 1952), section 12—Scope—Power to issue licences—Subject to control of the Government—If entitled Government to direct licensing authority to send all applications for licences to itself and consider them direct	724
Punjab Security of Land Tenures Act (X of 1953), sections 9 (1) (i), 19-F (b)—Application by a small land owner for ejectment of tenant—Landlord, a displaced person—Allottee of lands of less than fifty standard acres—Small landowner—On the date of application for eviction, granted more than fifty standard acres under consolidation proceedings—Status of small landowner—To be decided as on the date of commencement of Act and not as on the date of application for eviction	783
Rajasthan Passengers and Goods Taxation (Amendment and Validation) Act (XXII of 1964), sections 2 and 4—Validity	234
Rajasthan Tenancy Act (III of 1955), sections 15 and 161—Scope and effect—Tenants inducted by usufructuary mortgagee in possession when Tenancy Act came into force—Mortgagor if entitled to eject them after redemption of the mortgage	60
Representation of the People Act (XLIII of 1951), sections 83 (1) (a) and 92—Application for inspection of ballot boxes—When can be allowed by Election Tribunal	762
Representation of the People Act (XLIII of 1951) as amended by Act (XXVII of 1956), section 100 (1) (d) (iv)—Conduct of Election Rules (1961), rules 22, 30 and 56 (2) (g)—Name of a candidate for election, who was ultimately defeated, misprinted on the ballot papers—But his election symbol correctly shown against the misprinted name—Effect—Design of the ballot papers if becomes defective under rule 56 (2) (g)—If election of returned candidate rendered void under section 100 (1) (d) (iv) for contravention of rule 22—Scope and legislative history of section 100 (1) (d) (iv)	676
Representation of the People Act (XLIII of 1951), section 123 (4)—Scope—Allegation of corrupt practice against returned candidate—Strict proof necessary—Corrupt practice mentioned in section 123 (4)—Necessary ingredients—Onus of proof	762
Sale of Goods Act (III of 1930), sections 20 and 25 (1)—Forest Contract Rules, Rules 8 and 18—Felled trees in forest sold by Government by auction—Part of price paid on date of auction, the rest to be paid in instalments—After the acceptance of the bid of purchaser by Divisional Forest Officer, deed of contract signed by both—Later auctioned trees destroyed by fire in forest—Thereafter contract countersigned by Chief Conservator of Forests as required by rules—Property in auctioned trees if passed to buyer before the out-break of fire—Purchaser or on his default his surety if liable to pay the unpaid portion of the purchase price	311
Sea Customs Act (VIII of 1878), section 167 (81)—Interpretation—Import of gold forbidden by law—Person in possession of gold with foreign markings—Admittedly in custody thereof—Not concerned in actual import—Liability under section	701
Specific Relief Act (II of 1877), section 42—Mere declaration—If can be granted independently of the section—Compromise in proceedings against the Commissioner, Hindu Religious Endowments—Properties in dispute declared personal properties of the petitioners, subject to annual payments of certain cash and quantity of paddy to the temple—Subsequent suit by a worshipper for a declaration that the deity is not bound—Maintainability—Hindu Religious and Charitable Endowments Act (XIX of 1951), section 93	836
Sugar cane Cess (Validation) Act (XXXVIII of 1961), section 3—Scope and validity—If colourable legislation—Commission payable to Sugar cane Development Council—If can be collected for season when the Council had not yet come into existence	98
Suppression of Immoral Traffic in Women and Girls Act (CIV of 1956), section 3 (1)—Conviction under—Imposition of sentence of imprisonment in addition to fine obligatory—No discretion to award fine alone	718
Supreme Court Rules (1950), Order 16, rule 14—Scope—Civil Procedure Code (V of 1908), Order 22, rule 12 and Order 41, rule 4—Decree against principal debtor—Execution proceedings against joint sureties—Objections of sureties to enforceability of decree overruled by lower Courts—Appeal to Supreme Court—Death of one of the appellants during pendency of—His legal representatives not brought on record—Appeal abates in its entirety	622
Supreme Court Rules (1950), Schedule III, Part II, Item 2—Excise duty levied on goods manufactured by appellant under item 17 (4) of the Schedule to Central Excise and Salt Act (I of 1944)—Petitions of appeal to Supreme Court claiming that the goods should have been charged only under item 17 (3) and asking for refund of excess tax levied—Appropriate amount of Court-fees leviable on the petitions of appeal	584

Tenancy—Registered lease deed—Provisions for six months' notice to quit when tenant holds over—Notice not given—Suit in civil Court transferred to Thikka Controller under section 29 of the Calcutta Tenancy Act—Suit if can be maintained ..	503
Transfer of Property Act (IV of 1882), section 58 (c)—Mortgage by conditional sale—Sale with a condition for re-transfer—Distinction between—Test to determine ..	842
Travancore-Cochin General Sales Tax Act (XI of 1125, M.E.)—Assessment for 16th August, 1950 to 31st March, 1951—Turnover—If can include sales tax collected—Assessment on turnover including such amount—Suit for refund of excess collected—Jurisdiction of civil Court ..	55
Travancore-Cochin General Sales Tax Act (XI of 1925 M.E.), section 2 (j)—Hire-purchase agreement—Incidents of—Transaction entered into by execution of documents—If evidences a loan on security of goods or a hire-purchase agreement resulting in ultimate sale taxable under the Act—Determination of—Relevant factors—Court if can go behind the documents for ascertaining intention of parties ..	705
Trust—Security deposit by selling agent—In impressed with trust.. ..	547
Trusts Act (II of 1882), section 51—Applicability	547
Trusts Act (II of 1882), section 58.. ..	429
U. P. Agriculturist Relief Act (XXVII of 1934), section 12—U. P. Zamindari Abolition and Land Reforms Act (I of 1951) (as amended by U.P. Acts XVI of 1953 and XVIII of 1956)—U.P. General Clauses Act, section 6—Suit under section 12 of U.P. Agriculturist Relief Act for redemption of a usufructuary mortgage filed before 1st July, 1952—During pendency of the suit repeal of U.P. Agriculturists Relief Act by U. P. Act XVI of 1953 with retrospective effect from 1st July, 1952—Effect—If suit rendered incompetent	755
U.P. (Temporary) Control of Rent and Eviction Act (III of 1947), sections 3 (3), 3 (4) and 16—Bar created by sections 3 (4) and 16 excluding jurisdiction of civil Courts—Scope and extent of—Challenge before civil Court to order passed under section 3 (3) on the ground that it is a nullity—If barred—Scope of the width of the revisional powers conferred by section 3 (3)	681
U.P. Intermediate Education Act (II of 1921), as amended by (U.P. Act XXXV of 1958), sections 16-A to 16-I—Competency of Legislature to enact under Entry 11 of List II of Seventh Schedule to the Constitution of India—Section 16-F (4) if confers uncontrolled power—Section 16-B (3) read with section 16-D (3) if unreasonable—Section 16-D (4) if contravenes Articles 19 and 31 of the Constitution of India—Section 16-H if contravenes Article 14 of the Constitution	5
U.P. Municipalities Act (II of 1916), section 135 (3)—Scope and validity—If suffers from the vice of excessive delegation—If <i>ultra vires</i> Article 14 of the Constitution of India (1950)—If void as conferring judicial powers on Legislature.. ..	512
U.P. Sales Tax Act (XV of 1948), section 7 (1) and U.P. Sales Tax Rules, rules 39, 40, 41 and Form IV—Assessment of dealer in prior years—Basis return of turnover year—Dealer electing to submit quarterly returns for the assessment year—Previous sanction of Sales Tax Commissioner—Not necessary	743
Wealth-tax Act (XXVII of 1957), sections 2 (m) and 7—Wealth-tax—Assessee-company carrying on business—Computation of net wealth—Provision for income-tax liability—Deductible as debt owed—Gratuity payable under an industrial award—Liability under the award contingent on determination of employment—Not a liability <i>in praesenti</i> but contingent—Not deductible as debt owed—Net wealth—Excess of aggregate value of assets over the debts—Computation of net wealth and computation of value of assets—Distinction	497
Wealth-tax Act, 1957 (Central Act XXVII of 1957), section 5 (1) (xxi)—Wealth-tax—Exemption—Assessee, an industrial undertaking—New and separate unit set up after the Act—Net wealth employed in establishing the new unit—Construction of factory buildings, erection of plant and machinery after the Act—Exemption—Period of exemption—Setting up unit—Commencement of operations for the establishment of unit—Distinction	123
Will—Construction—Disposition in favour of a person—Beneficiary if takes as a <i>persona designata</i> or by reason of his fulfilling certain legal status—Determination of—Test.. ..	15
Will—Proof of—Attesting witness—Not proving signature of the other attester there to—Effect	450
Words and Phrases—"By contract or otherwise"	493
Words and Phrases— <i>Devadayam</i> and <i>Stalathar poruppu manyam</i>	605
Words and Phrases—"Letter of credit", "clean bill of lading"	443

TABLE OF CASES IN THIS PART

SUPREME COURT OF INDIA

	Pages.
Ammathayee v. Kumaresan	830
Badaku Joti Svant v. State of Mysore	701
Bapuswami v. Pattay Gounder	842
Bhagwan Das v. State of Punjab	783
Binayak Swain v. R. C. Panigrahi	793
M/s. British Paints (India) Ltd. v. Its Workmen	789
Eramma v. Veerupana	746
Gopi Ram v. State of Rajasthan	818
Jagat Bahadur v. State of M.P.	721
Dr. Jagjit Singh v. Giani Kartar Singh	762
Jahiruddin v. K. D. Rathi	749
Lakshmi Chand Khemani v. Kauran Devi	738
Master Construction Co. (P) Ltd. v. State of Orissa	801
Modi Sugar Mills Ltd. v. Commr. of Sales Tax	743
Mohd. Idris v. Sat Narain	755
Nalini Dassi v. Kshitish Chandra Hajra	730
M. Pullaiah v. M. Narasimham	848
V. Ramaraghava Reddy v. K. Seshu Reddy	836
Sarangadeva Periya Matam v. Ramaswami Goundar	734
Shivanarayana Kabra v. State of Madras	825
Sita Ram v. State of U. P.	809
S. S. Srivastava v. General Manager, N.E.Ry.	797
State of Gujarat v. M/s. Ananta Mills, Ltd.	759
State of Gujarat v. Vinaya Chandra C. L. Pathi	821
State of M. P. v. M/s Azad Bharat Finance Co.	815
State of M.P. v. Haji Hasan Dada	715
State of M. B. v. Hiralal Ji	775
State of Madras v. Srinivasan	855
State of Maharashtra v. Jugmander Lal	718
State of Mysore v. M/s. Guduthur Thimmappa & Son	812
State of Punjab v. Hari Kishan Sharma	724
State of U. P. v. Madan Mohan Nagar	805
Sundaram Finance Ltd. v. State of Kerala	705
The Lord Krishna Sugar Mills, Ltd. v. The Municipal Board, Saharanpur	777
Tirunagar Panchayat v. Madurai Co-op. H.C. Society	845

INDEX OF REPORTS

Bengal Agricultural Debtors Act (VII of 1936), section 37-A introduced by Act XI of 1942—Agricultural debtor—Mortgage action—Sale of property—Purchase by decree-holder—Provision for delivery back of the property to agricultural debtor—Applies in the case of a <i>bona fide</i> purchaser from auction-purchaser also—Amount of debt—Jurisdiction of the Board under the Act—Jurisdiction—Question to be raised at the earliest stage	730
Bombay Sales Tax (Exemption, Set-off and Composition) Rules (1954), rules 6 (ii) and 12 (1)—Scope—Assessee, manufacturer of cotton textiles, purchasing unginned cotton from unregistered dealers—Paying purchase tax thereon—Unginned cotton ginned and used in manufacture of cotton textiles—Cotton seeds sold—Assessee if entitled to refund, under rule 12 (1), of purchase tax paid	759
Central Excise and Salt Act (I of 1944), sections 19 and 21—Powers of arrest and interrogation conferred on Excise Officer—Excise Officer, if a 'Police Officer' thereby—Admission before such officer—Not hit by section 25 of the Evidence Act (I of 1872)—Admissible in evidence	701
Central Provinces and Berar Industrial Disputes Settlement Act (XXIII of 1947), section 16—Nature of right conferred under—Notification of State Government exempting a textile mill from operation of section 16—Employees of the said mill dismissed while such notification was in force—Exemption withdrawn later—Applications by dismissed employees thereafter under section 16 for reinstatement—Maintainability	749

C.P. and Berar Sales Tax Act (XXI of 1947) (before amendment by Act XX of 1953) —Scope—Claim for refund of tax assessed and paid alleged to be in excess of amount due—Assessment order not set aside or modified—If can be entertained by the assessing officer (Assistant Commissioner)	715
Central Sales Tax Act (LXXIV of 1956), section 3—Sales in the course of Inter-State Trade—Tests	812
Civil Procedure Code (V of 1908), Order 8, rule 5—Strict rule of pleadings prescribed by—If applies to election proceedings	762
Civil Procedure Code (V of 1908), section 144—Scope—Plaintiff decree-holder himself purchasing properties sold in execution of an <i>ex parte</i> decree against defendant— <i>Ex parte</i> decree set aside on appeal and case remanded for re-trial—Application by defendant for restitution under section 144—Such application coming for disposal after a fresh decree was passed in favour of plaintiff at re-trial—Defendant if entitled to restitution	793
Civil Service Regulations (as amended by Uttar Pradesh Government), Article 465-A read with Note (1)—Order of compulsory retirement—If amounts to dismissal— Test	805
Constitution of India (1950), Article 136—Election appeals brought to Supreme Court under—Interference with findings of facts recorded by High Court—Practice	762
Constitution of India (1950), Article 136—New plea—Cannot be raised for first time before Supreme Court	812
Constitution of India (1950), Article 136—Party who has not exhausted all his other remedies—If can invoke Article 136	801
Constitution of India (1950), Article 311—Applicability	805
Constitution of India (1950), Article 311—Disciplinary proceedings—Reference to Tri- bunal—Findings against delinquent officer—Compulsory retirement recommen- ded—Notice to show cause—Explanation submitted—Consultation by Govern- ment with State Public Service Commission—Order for retirement proper—G.O. No. 902 dated 28th May, 1938, commented upon	855
Constitution of India (1950), Article 311—Government servant's name included in the panel for promotion to next higher post—Such inclusion stated to be provisional —Subsequent removal of the name of the Government servant from the panel—If amounts to "reduction in rank."	797
Contract— <i>Pucca adat</i> system of the Bombay market—Incidents—Status of <i>pucca adatia</i>	825
Criminal Procedure Code (V of 1898), sections 361 (1), 537 and 239—Contravention of section 361 (1)—But no prejudice caused—Trial not vitiated—Several items of cheating part and parcel of one transaction—Trial on a single charge—Validity	825
Criminal Procedure Code (V of 1898), section 423—Appellate Court—Powers of— No power to impose punishment higher than the maximum that could have been imposed by trial Court.	721
Criminal trial—Misappropriation charge—Entries made by accused in a slip of paper together with statement of complainant amounting to admission of guilt—Admissi- bility of the slip—Admissions made under section 342 of Criminal Procedure Code in another criminal case and application made by accused in another criminal case containing admissions—Admissibility	821
Defence of India Rules (1962), rules 30 (1) (b) and 30-A (7)—Order of detention served on detenu while in jail custody—Validity of—Order of Governor that detention be continued—No recital of review by the reviewing authority under rule 30-A (7)— Affidavit proving such review—Detention valid	818
Delhi Rent Control Act (LIX of 1958), sections 2 (1) and 50—Decree in ejectment against a tenant under the previous Delhi and Ajmer Rent Control Act, 1952— Not executable—If still a tenant under section 2 (1)—Civil suit against him for possession—If barred under section 50—Slum Areas (Improvement and Clearance) Act, 1956, section 19	738
Evidence Act (I of 1872), section 25—Confession in a letter addressed to Sub-Inspector— If made to a Police Officer—Admissibility	809
Evidence Act (I of 1872), section 45—Handwriting of a person—Proof—Examination of a handwriting expert if a <i>sine qua non</i>	821
Evidence Act (I of 1872), section 112—Scope and effect	830
Family arrangement—What constitutes—Two brothers—Agreement in writing allot- ting 3 shares to one and 2 shares to the other in partition—Not registered—Partition in future contemplated—Validity—Registration Act (XVI of 1908), section 17 (1) (b)	848
Forward Contracts (Regulation) Act (LXXIV of 1952), sections 2 (c) and 15—Scope— Speculative contracts—If falls within the purview of the Act	825
Hindu Law—Joint family—Gift—Power to gift away ancestral movable or immovable properties—Limitations—Gift by husband to wife of immovable ancestral property —Validity—If becomes valid if made to carry out wishes of the father of the husband —Father-in-law's power to gift ancestral immovable property to daughter-in-law.. .. .	830

Hindu Succession Act (XXX of 1956), section 8—Male Hindu dying intestate before the commencement of the Act—Section not retrospective—Inapplicable to a case of succession opening before the Act—Section 14—Property possessed by a female Hindu—Property with some kind of title contemplated—No conferment of title in case no title was possessed—Hindu male dying leaving wives—Hindu Women's Right to Property Act of 1937, not in operation then—Possession of widow as against the adopted son of another wife—No enlargement of estate—Trespasser ..	746
Industrial Dispute—Age of retirement—Distinction between clerical and subordinate staff and workmen in factory—Gratuity scheme (Provident fund scheme already existing)—Minimum period of service—Quantum—Basis of—Basic wage or wage and dearness allowance together	789
Interpretation of Statutes—' Shall ', meaning of	815
Limitation Act (IX of 1908), section 28 and Article 144—Perpetual lease, without legal necessity, of properties belonging to a math by its matadhipathi—Lessee ceasing to pay rent after the death of the matadhipathi granting the lease and possessing the demised properties on his own behalf—Adverse possession against the math when commences—If commences only from the date of appointment of a successor matadhipathi	734
Madhya Bharat Sales Tax Act (XXX of 1950), Notification No. 58 under the Act, Item No. 39—Purchase by assessee of scrap iron locally and import of iron plates from outside—Sale after conversion into bars, flats, and plates—Exempt from sales tax under the Notification—Distinction between sale of raw materials and goods prepared from such raw materials	775
Madras General Sales Tax (Turnover and Assessment) Rules (1939), rule 4-A (iv) (b)—Scope—Tax under, when attracted	812
Madras Hindu Religious Endowments Act (II of 1927), sections 6 (17) and 84 (2)—Order of Endowments Board declaring a temple 'public temple'—Petition to set aside the order—Scope of—Compromise—Deity if represented by the Commissioner—respondent—Decree if binding on deity	836
Madras Village Panchayats Act (X of 1950), section 58—Scope—Parks, playgrounds, schools, club, etc.—Amenities to residents of village by House Construction Society—If vest in the Panchayat of the village	845
Municipality—Rules on Tolls in force in the Municipal Area of Saharanpur (1949) (before Amendment on 7th September, 1955), Rule 8 (a)—Toll tax payable on entry of goods within municipal limits—Exemption from under rule 8 (a) as being meant for immediate export—When can be claimed—Goods entering municipal limits passing out of export barrier and unloaded at railway station of Saharanpur for being exported by rail—Railway station situated beyond export barrier but within municipal limits—Such goods if entitled to exemption under rule 8 (a) ..	777
Opium Act (I of 1878), as amended by Opium (Madhya Bharat Amendment) Act (XV of 1955), section 11—Provisions if mandatory	815
Orissa Sales Tax Rules (1947), rule 83—Scope of jurisdiction of Commissioner of Sales Tax under	801
Penal Code (XLV of 1860), section 302—Offence of murder—Circumstantial evidence—Conviction based on	809
Penal Code (XLV of 1860), section 420—Conviction under—False pretence in express words not necessary	825
Practice—Appeal to Supreme Court by Special Leave—Concurrent findings of fact—If can be questioned	809
Practice—Finding of High Court based on appreciation of evidence—Interference with by Supreme Court	721
Practice—Second Appeal—Concurrent finding of fact—No power to interfere ..	842
Punjab Cinemas (Regulation) Act (XI of 1952), section 5 (2) corresponding to Cinema Regulations Act (Central) (XXXVII of 1952), Section 12 Scope—Power to issue licences—Subject to control of the Government—If entitled Government to direct licensing authority to send all applications for licences to itself and consider them direct	724
Punjab Security of Land Tenures Act (X of 1953), sections 9 (1) (i), 19-F (b)—Application by a small land owner for ejectment of tenant—Landlord, a displaced person—Allottee of lands of less than fifty standard acres—Small landowner—On the date of application for eviction, granted more than fifty standard acres under consolidation proceedings—Status of small landowner—To be decided as on the date of commencement of Act and not as on the date of application for eviction ..	783
Representation of the People Act (XLIII of 1951), sections 83(1) (a) and 92—Application for inspection of ballot boxes—When can be allowed by Election Tribunal ..	762
Representation of the People Act (XLIII of 1951), section 123 (4)—Scope—Allegation of corrupt practice against returned candidate—Strict proof necessary—Corrupt practice mentioned in section 123 (4)—Necessary ingredients—Onus of proof ..	762

	PAGES
Sea Customs Act (VIII of 1878), Section 167 (81)—Interpretation—Import of gold forbidden by law—Person in possession of gold with foreign markings—Admittedly in custody thereof—Not concerned in actual import—Liability under section ..	701
Specific Relief Act (II of 1877), section 42—Mere declaration—If can be granted independently of the section—Compromise in proceedings against the Commissioner, Hindu Religious Endowments—Properties in dispute declared personal properties of the petitioners, subject to annual payments of certain cash and quantity of paddy to the temple—Subsequent suit by a worshipper for a declaration that the deity is not bound—Maintainability—Hindu Religious and Charitable Endowments Act (XIX of 1951), section 93	836
Suppression of Immoral Traffic in Women and Girls Act (CIV of 1956), section 3 (1)—Conviction under—Imposition of sentence of imprisonment in addition to fine obligatory—No discretion to award fine alone	718
Transfer of Property Act (IV of 1882), section 58 (c)—Mortgage by conditional sale—Sale with a condition for re-transfer—Distinction between—Test to determine ..	842
Travancore-Cochin General Sales Tax Act (XI of 1125 M.E.), Section 2 (j)—Hire-purchase agreement—Incidents of—Transaction entered into by execution of documents—If evidences a loan on security of goods or a hire-purchase agreement resulting in ultimate sale taxable under the Act—Determination of—Relevant factors—Court if can go behind the documents for ascertaining intention of parties ..	705
U. P. Agriculturist Relief Act (XXVII of 1934), section 12—U. P. Zamindari Abolition and Land Reforms Act (I of 1951) (as amended by U.P. Acts XVI of 1953 and XVIII of 1956)—U. P. General Clauses Act, section 6 —Suit under section 12 of U. P. Agriculturist Relief Act for redemption of a usufructuary mortgage filed before 1st July, 1952—During pendency of the suit repeal of U.P. Agriculturist Relief Act by U. P. Act XVI of 1953 with retrospective effect from 1st July, 1952—Effect—If suit rendered incompetent	755
U.P. Sales Tax Act (XV of 1948), section 7 (1) and U.P. Sales Tax Rules, rules 39, 40, 41 and Form IV—Assessment of dealer in prior years—Basis return of turnover for the previous year—Dealer electing to submit quarterly returns for the assessment year—Previous sanction of Sales Tax Commissioner—Not necessary ..	743

RECENT DEVELOPMENT IN INDIAN FEDERALISM.

By

BRAHMA BHARADVAJA,

Delhi-7.

The results of the general elections of 1967 have brought to light some startling facts. The Congress party has lost its monopolistic hold on the national politics. The various opposition parties have emerged and captured Government in some eight States. The situation in some other States also is not stable, and so it will not be surprising if any other State follows the Haryana-U.P. pattern. So long the Congress controlled the Governments both in the States and in the Union, the Centre-State relations were mostly an internal problem of the Congress party. But the conditions have changed, for the Union has a Congress ministry, and the States in many cases have ministries from the opposition, who are under no control of the Congress High Command. The question therefore arises what would be the basis and pattern of the Union-State relations now, and whether these relations would be influenced by a federal approach, or by unitary. So far, as the legal points are concerned, there are provisions for both of them in the Constitution. The problem is further complicated as there is no single opposition party forming the Governments in the States. On the other hand, they are coalition of several regional parties. Under this circumstance, there is danger of fissiparous tendencies. The centripetal forces have weakened the unifying grip of the Union. Can the Union tighten its authority over the State, and if so how? In brief the problem is of unity, uniformity and the autonomy of the States. An answer to such problem is suggested in the following pages.

Federation implies that there are two sets of Governments, co-ordinate to each other, neither being subordinate to the other. Their spheres are defined, encroachment of which is prohibited.¹ "A federal State", says Finer, "is one in which part of the authority and power is vested in the local areas while another part is vested in a central institution deliberately constituted by an association of previously independent local States. Neither has the right to take away power and authority belonging to the other"². Thus the federal principle means the method of dividing power so that the Central Government and the Governments of the units are each, within a sphere, co-ordinate and independent³. The principle, therefore, emphasises the fact that in each Government, there is complete want of subordination of the one to the other⁴. So a federation requires a written supreme constitution, constitutional distribution of power between the federal and the State Governments, and an independent authority to interpret the constitution. These are the essentials of a federation.

1. Livingston, Federalism and Constitutional Change, p. 10.

2. Finer, Theory and Practice of Modern Government, p. 166.

3. Wheare, Federal Government, p. 11.

4. "Complete want of dependence" as proposed by A. K. Ghosal (Federalism in the Indian Constitution, Indian Journal of Political Science, October-December, 1953) cannot be stretched too far, because the modern state is dependent on the assistance and cooperation of several states both national and international. Secondly the very idea of federation indicates that the federating units are not self-sufficient.

The nature of the Indian Constitution is much debated by scholars. There are three main sets of opinion. The first category consists of those who think that the Constitution is federal in normal times; but it is capable of being changed into a unitary type in emergencies. The Chairman of the Drafting Committee remarked in the Assembly that "the Draft Constitution is Federal Constitution inasmuch as it establishes what may be called a Dual Polity... each being endowed with sovereign powers to be exercised in the field assigned to them, respectively by the Constitution... (but it) can be both unitary as well as federal according to the requirements of time and circumstances. In normal times it is framed to work as a federal system. But in times of War it is so designed as to make it work as though it was a unitary system"⁵. Jennings thinks that in the Indian Constitution national interest is supreme over the principle of federalism.⁶ The other extreme view is represented by K. P. Mukerji who regards it as unfederal.⁷ On an analysis of the working of the Constitution, some hold that the trend is towards unitarianism rather than towards federalism.⁸ The third category consists of those who hold a moderate view. To them the Constitution of India is neither purely federal, nor unitary; it is federal with unitary features, or unitary with federal elements. So they regard it as 'quasi-federal'.⁹ Some prefer to call it a 'union constitution', and think that it should never be called 'quasi-federal'.¹⁰

The supporters of federalism in the Indian Constitution advance two strong arguments. Firstly they claim that the States are sovereign in their respective fields.¹¹ "A local executive fully responsible to a local Legislature answers a good deal of local internal sovereignty, and sovereignty means statehood, limited as it may be by the distribution of powers".¹² The term 'sovereign' here appears to have been used in a loose sense and is no more significant than the word 'autonomous'.¹³ The question of the nature of sovereignty of the States has been reviewed by the Supreme Court in the *State of West Bengal v. Union of India*.¹⁴ The Supreme Court holds that "the distribution of powers, legislative and executive—does not support the theory of full sovereignty in the State so as to render it immune from the exercise of legislative power of the Union Parliament particularly in relation to acquisition of property of the State.... The ground of absolute sovereignty of States which may not be interfered with by taking property vested in the State by Parliamentary legislation, has no legal basis".¹⁵ On the other hand the Supreme Court, endorses the concept of superiority of the Union over the States which has been held by some scholars.

5. Constituent Assembly Debates 4th November, 1948, This view has been endorsed by D. Basu, *Commentary on the Constitution of India*, Vol. I, Edn. III, 20; A. K. Ghosal, *op. cit.*; Alexandrowicz, *Constitutional Developments in India*, p. 170; Ramchandran, *Federal Supremacy in the Indian Constitution*, the *All India Reporter*, December, 1952; K. Santhanam, *Indian Federalism at Work*, *Indian and Foreign Review*, Vol. I No. 7, January 15, 1964; K. Santhanam *Changing Pattern of Union-State Relations in India*, *Indian Journal of Public Administration* Vol. 9, No. 3.

6. *Some Characteristics of Indian Constitution*, p. 55.

7. *Is India a Federation?* *Indian Journal of Political Science*, (1954), p. 177; S. P. Aiyer (*Federalism and Social Change* pp. 9-10) follows the same line of arguments.

8. K. V. Rao, *Centre-State Relations in Theory and Practice*, *Indian Journal of Political Science* October-December, 1953; S. C. Gangal: *An Approach to Indian Federalism*, *Pol. Science Quarterly*, Vol. LXXVII, Vol. 2; Basu, *Introduction to the Indian Constitution*.

9. Wheare, *Federal Government*, p. 28.

10. Aiyer, *op. cit.*, p. 9.

11. Constituent Assembly Debates, 4-11-1948.

12. Alexandrowicz, *op. cit.*, p. 169.

13. D. N. Bannerjee, *Some Aspect of Indian Constitution*, p. 114.

14. (1964) 1 S.C.R. 371; A.I.R. 1963 S.C. 1241, 1255-65.

Secondly the argument is that the provisions which give the Constitution a unitary character, mainly relate to emergency. Where these provisions are not attracted the Constitution is federal. In normal times both the Union and the States have exclusive jurisdiction; neither can interfere with the jurisdiction of the other nor can delegate its function to the other.¹⁵ Justice Mahajan thus observed in *re Delhi Laws Act*, "It is implicit in the demarcating of legislative fields that one legislature cannot by delegation of subjects that are exclusively within its jurisdiction clothe the other with legislative capacity to make laws on that subject as it will amount to an infringement of the constitution itself. It seems, therefore, that delegation of legislative power to that extent, is prohibited by the Constitution".¹⁶

Any conclusion regarding the nature of the Indian Constitution should not be reached ignoring reference to certain provisions of the Constitution as, for example, the Centre's power to issue directives to the States, its responsibility to ensure good constitutional Government in the States¹⁷ and special position of the Governor in a State. In the following pages it is proposed to examine the nature and extent of the power of the Union to issue directives to a State.

For a proper understanding of the scope of the power to give directions, it is essential to examine the provisions of Articles 256, 257 and 258 and some expressions such as 'State', 'functions', 'power', 'authorities of the State'. One may give restricted interpretation to these words because the Articles are set in the chapter dealing with the administrative relations between the Union and the States. So the *prima facie* presumption is that the word 'State' refers to the State Executive only although in the provisions themselves there is no such suggestion. On the contrary, the provisions use, where necessary in the same Articles, such expressions as 'executive power of the State', 'executive power of the Union', and 'Government of a State'. In the absence of an epithet it is difficult to give the word a restricted meaning. Under Articles 12 and 36 the expression 'State' expressively includes the Government and Parliament of India as well as the Government and Legislature of a State.¹⁸

Article 256 requires a State to exercise its executive power in such manner as to ensure compliance with the law made by Parliament. Article 257 (1) further provides that the executive power of every State shall be so exercised as not to impede the exercise of the 'executive power of the Union'. In both the cases the Union Government may issue directions to the State Government to secure compliance with the Union law or with the Union executive. The object of Article 256 is that Union laws should not be disregarded by the State Government, whereas the object of Article 257 (1) is to avoid any conflict between the executive policy of the State and that of the Union. "So even within the sphere covered by

15. Basu, *op. cit.*

16. (1951) S.C.R. 747, 941; 1951 S.C.J. 527; A.I.R. 1951 S.C. 332. *Reference under Article 143 of the Constitution of India*. It may be noted that various Parliamentary statutes have been delegating rule-making power to the governments of the States; for example: The Probation of Offenders Act of 1958, the Wakfs Act of 1954, the Central Sales Tax Act of 1956, the Road Transport Corporation Act of 1950, the Administration of Evacuee Property Act of 1950, the State Financial Corporation Act of 1951, the Plantations Labour Act of 1951, the Hindu Marriage Act of 1955, The Pharmacy Act of 1948, the Prevention of Food Adulteration Act of 1954.

17. The Union Government has exercised its power under this provision and set up Commissions to inquire into the affairs relating to the Chief Minister of Punjab and a former Chief Minister of Jammu and Kashmir.

18. Opinion of the Supreme Court of India on *Special reference No. 1 of 1964*, p. 27.

List II, the Union Executive shall have the power to give directions to the State Executive so that the exercise of the State power may not prejudicially affect the exercise of the executive power of the Union i.e., the administration of the Union or the concurrent subjects."¹⁹

In a system of demarcated jurisdiction it is difficult to foresee a situation where conflict between the State Executive and the Union Executive may arise. The occurrence of such a conflict is more probable where both the State and the Union exercise jurisdiction over the same subject. Since the Constitution has defined the jurisdiction of the two, the possibility of such a conflict is remote. Thus the executive policy of the State with regard to subjects under List II cannot conflict with the executive policy of the Centre in the sphere covered by List I. Under the Concurrent List both can exercise jurisdiction, but the Constitution prescribes that a Union law supersedes the State law whenever the latter is repugnant to the former.²⁰ Since under the Constitution executive power is coterminous with the legislative power²¹ there is no possibility of conflict of jurisdiction in the executive field.

There is however one such possibility when Parliament delegates legislative power to a State Government either in the realm of List I or of List III. The State Government may exercise this power in a manner which does not conform to the policy of the Union Government. But it may be remembered that in such a case the State Government is acting merely as a delegate of Parliament. So it is always subject to supervision, direction and control by the latter. Parliament has every competence to control the discretion of the delegate either directly or through another delegate such as the Union Government or State Legislature. Hence there is no need for a constitutional provision for this purpose.

The provision should be justified by the need when the Union, without disturbing the normal Government, has to interfere in a matter in which it has no competence. A conflict is likely to arise when both the Union and State have different policies and conflicting views on a matter. But in that case it would not be possible for the Union to control the State executive without controlling the State Legislature, because in a Parliamentary Government principal decisions for action are taken by the legislature in the form of enactments and resolutions. The executive is charged with the duty of carrying out the legislative mandate. Thus the executive policy is subservient to the legislative policy. So the former cannot be controlled without interfering with the latter. If so, Article 256 (1) will enable the Union to curb the initiative which deviates from its policies. It is in this case that the existence of Articles 256 and 257 (1) can be justified for no other case warrants their inclusion.

The scope of the Articles 256 and 257 (i) appears to be wide and is not limited to those matters only to which the legislative power of Parliament or the executive power of the Union applies. Article 256 only states: "The executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State, and the executive powers of the Union shall extend to the giving of such direction to State as may appear to the Government of India to be necessary for that purpose". Article 257 (1) also reads "The executive power of every State shall be so exercised as not

19. Basu, op. cit., Edn. IV, Vol. 4, p. 411.

20. Article 254.

21. *Ramjaya Kapur v. State of Punjab*, (1955) S.C.R. 225 : (1955) 2 M.L.J. (S.C.) 59 : (1955) S.C.J. 504 : A.I.R. 1955 S.C. 549.

to impede or prejudice the exercise of the executive power of the Union, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose". These Articles do not state that only in the sphere where the Union exercises executive powers, it can issue directions. In all cases where a State enforces Union laws, it is a subordinate agent of the Union. It is a unit of administration and not of the federation. So these Articles appear to serve no useful purpose because it is well recognized that power to issue directives to a subordinate is inherent in the nature of the executive power.

The above two Articles obviously make the executive power of a State secondary to the executive power of the Union, and vest the Union with power of general control and superintendence over the States. If the power to issue directives is held coterminous with the executive power of the Union, the conclusion is obvious that the provision is meaningless because there can be no occasion for its application. The Constitution does not provide for concurrent executive jurisdiction—a jurisdiction where both the Union and the State can exercise powers. Under the List I the Union exercises executive powers but it has no such power as Parliament may confer on any other authority.²² In the concurrent jurisdiction of List III it has no such power unless expressly conferred by Parliament.²³ Thus the executive authority of the Union ends where the authority of a State begins. There is no overlapping in the executive jurisdiction of the two.²⁴ It may be noted here that the Central Government has been issuing directives to the State Governments on various matters. It was in accordance with the direction from the Central Government that the Rajasthan Government imposed tax on agricultural income, betterment levy, and also issued several orders under the Essential Commodities Act of 1955.²⁵

Sanction behind the Directives.

The nature of the directives is mandatory, not directory. Non-compliance with them may lead to serious consequences. It may sometimes result in the end of the normal parliamentary Government in the State. Article 365 of the Constitution clearly states: "Where any State has failed to comply with, or give effect to, any directions given in the exercise of the executive power of the Union under any of the provisions of this Constitution, it shall be lawful for the President to hold that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution".

In this connection attention may be drawn to the special position of the Governor as an agent of the Union Government. The Governor is appointed for a term of five years but holds office during the pleasure of the President which may be withdrawn for any reason anytime before the expiry of the five year term. Further, the Governor is not responsible and answerable to any State agency. On the other hand it is his special responsibility to report to the President on the affairs in the State. He may therefore be an effective agent of the Union to carry on directives in the State. Recently the Union Cabinet took a decision to impose President's rule in the Punjab ignoring the views of the Governor who was, as the

22. Article 53 (3).

23. Articles 73 (1), 162.

24. Jennings also regards these provisions as of little value. Some characteristics of Indian Constitution, 69-70

25. Iqbal Narain and P. C. Mathur, *Union-State Relations in Indian—A Case-study in Rajasthan*, Journal of Commonwealth Political Studies, Vol. II, No. 2.

several newspaper reports indicated, opposed to such a decision. The Governor was transferred to another State and a new Governor was appointed to facilitate the implementation of the decision. The incident indicates that the Governor does not have an independent personality.¹

The object of the Constitution seems to be to ensure stable and good Government in the country, for the attainment of which federalism is only a means. The framers of the Constitution had little hesitation in sacrificing the federal principle in national interest. To preserve the unity, they have adequately strengthened the Union to curb any fissiparous tendencies. The underlying principle of the Constitution appears to be a blending of unity, uniformity and local autonomy.

[END OF VOLUME (1967) 1 S.C.J. (JOURNAL).]

1. How little the Union cares for the State Government is evidenced by the decision of the Centre to redefine the boundaries of the Punjab State on linguistic basis. It took the State government by surprise because it had consistently opposed any division of the State.

[SUPREME COURT.]

J. M. Shelat and
G. K. Mitter, JJ.
21st February, 1967.

The State of Mysore v.
Syed Ibrahim.
Cr.A. No. 10 of 1965.

Motor Vehicles Act (IV of 1939), sections 2 (18), (16), 33 and 42 (1)—Scope of section 42 (1)—‘Transport vehicle’, ‘public service’ vehicle—Meaning of.

Any motor vehicle used for carriage of passengers for hire or reward is regarded, when so used as a public service vehicle and therefore a transport vehicle. It is the use of the motor vehicle for carrying passengers for hire or reward which determines the category of the motor vehicle whether it is adapted for that purpose or not. It must follow that even if a motor vehicle is occasionally used for carrying passengers for hire or reward it must be regarded when so used as a public service vehicle and therefore a transport vehicle and if it is so used without the necessary permit such use would be in breach of section 42 (1) and the owner who uses it or permits it to be so used would be liable to be punished under section 42 (1) read with section 123.

The combined effect of section 42 (1) and the definitions of a ‘motor vehicle’, a ‘public service vehicle’ and a ‘transport vehicle’ is that if a motor vehicle is used as a transport vehicle, the owner who so uses it or permits it to be so used is required to obtain the necessary permit. It is the use of the motor vehicle for carrying passengers for hire or reward which determines the application of section 42 (1). Therefore, whenever it is so used without the permit, there is an infringement of the sub-section. If the construction of that sub-section adopted by the High Court of Mysore were correct, it would mean that whereas an owner of a transport vehicle is required to have the permit, the owner of a motor vehicle not constructed or adapted as a transport vehicle can carry with impunity passengers for hire or reward without any permit therefor. Section 42 (1) has been enacted for the purpose of controlling vehicles carrying passengers, the object of such control being obviously to ensure safety of passengers. The construction accepted by the Mysore High Court would defeat the object for which the Legislature provided such control in the interest of and for the safety of passengers. The view taken by the Mysore High Court with respect is not correct and the view taken by the High Court of Madras is not only correct but is in consonance with the purpose and object of section 42 (1).

R. H. Dhebar and S. P. Nayyar, Advocates, for Appellant.

G.R.

Appeal allowed.

[SUPREME COURT.]

M. Hidayatullah,
J. M. Shelat and
G. K. Mitter, JJ.
23rd February, 1967.

Sher Singh v.
The State of U.P.
Cr. A. No. 191 of 1964.

Criminal trial—Evidence—Eye-witness—Appraisal of evidence—Relating of witness to parties—Effect.

The evidence of the eye-witnesses is consistent, convincing and credible. The Sessions Judge lost sight of the main issue, namely, whether what the eye-witnesses said was credible, in an attempt to examine the inter-relation of the witnesses. This is an inquiry of value up to a point but is not conclusive because there is no crime proved in small village communities where some kind of relationship cannot be established between witnesses and the victim and some petty quarrel shown to have taken place in the past between some of the witnesses and the accused. To decide a case on the basis of such circumstances, unless they are of great or significant magnitude, is to place reliance on collateral circumstances at the expense of direct

evidence of guilt which really matters. The first serves as a check upon the latter but no more. The evidence of the eye-witnesses here is clear. The findings of the High Court are supported by evidence of sufficient probative force.

A. S. R. Chari, Senior Advocate (*A. K. Nag*, Advocate, with him), for Appellants.
O. P. Rana, Advocate, for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT.]

K. N. Wanchoo,
R. S. Bachawat and
V. Bhargava, JJ.
 24th February, 1967.

Mahant Harnam Singh v.
 Gurdial Singh
 C.A. No. 1377 of 1966.

Civil Procedure Code (V of 1908), section 92—Right to institute suit by persons having interest in the trust.

Mere residence in a village where free kitchen is being run for providing food to visitors does not create any interest in the residents of the village of such a nature as to claim that they can institute a suit for the removal of the Mahant. The nature of the interest that a person must have in order to entitle him to institute a suit under section 92, Civil Procedure Code, was first examined in detail by the Madras High Court in *T. R. Ramachandra Aiyar v. Parameswaran Unni*, I.L.R. 42 Mad. 360.

It is not necessary to refer to other opinions expressed by the learned Judges in that case in view of the decision of their Lordships of the Privy Council in *Vaidyanatha Ayyar v. Swaminatha Ayyar*, L. R. 51 I.A. 282, where they approved the opinion expressed by Sir John Wallis, C.J., in the case cited above, and held: "They agree with Sir John Wallis that the bare possibility, however remote, that a Hindu might desire to resort to a particular temple gives him an interest in the trust appears to defeat the object with which the Legislature inserted these words in the section. That object was to prevent people interfering by virtue of this section in the administration of charitable trusts merely in the interests of others and without any real interests of their own. Agreeing with the view expressed by the Privy Council, it was held that the plaintiffs-respondents, who were merely Lambardars and residents of village Jhandawala, had, in those capacities no such interest as could entitle them to institute this suit.

In view of the above, it was held, it was unnecessary to express any opinion at all on the other main point decided against the appellant by the High Court, viz that there were sufficient grounds for the removal of the appellant from the office of the Mahant.

Naunit Lal, Advocate, for Appellant.

I. M. Oberoi, *S. K. Mehta* and *K. L. Mehta*, Advocates, for Respondent No. 1.

G.R.

Appeal allowed.

[SUPREME COURT.]

K. N. Wanchoo,
R. S. Bachawat and
V. Bhargava, JJ.
 24th February, 1967.

The State of Assam v.
 The Gauhati Municipal Board, Gauhati.
 C.A. No. 1268 of 1966.

Assam Municipal Act (XV of 1957), section 298—Proceedings against Board—Analogy of Article 311 of the Constitution of India (1950)—If applicable.

Where a provision like section 298, Assam Municipal Act, is fully complied with as in this case and the Board does not ask for an opportunity for personal hearing or for production of materials in support of its explanation, principles of natural justice do not require that the State Government should ask the Board to

appear for a personal hearing and to produce materials in support of the explanation. Merely because the State Government did not call upon the Board to appear for a personal hearing and to produce material in support of its explanation it cannot be held the principles of natural justice were violated. This ground in support of the order of the High Court therefore fails.

The High Court has relied on decisions under Article 311 of the Constitution relating to removal, dismissal and reduction in rank of public servants and was apparently of the view that the State Government should first have considered the explanation and then made up its mind as to which one of the two alternatives provided in section 298 should be used and then presumably given a second notice to the Board to show cause why one of the alternatives tentatively decided upon should not be pursued. It is not correct to use the analogy of Article 311 for the purpose of section 298 of the Act. The issue of two notices under Article 311 is a very special procedure depending upon the language of that Article. There are no comparable words in section 298. There is no reason why when giving notice the State Government should not indicate to the Board tentatively which of the two alternatives it intends to pursue. Such tentative conclusion communicated to the Board does not mean that the State Government is not open to conviction at all and whatever the explanation it would pass an order in accordance with its tentative conclusion. There is therefore no reason to think that all proceedings subsequent to the issue of notice dated 9th June, 1964 were in this case a farce.

S. V. Gupte, Solicitor-General of India (*Naunit Lal*, Advocate, with him), for Appellants.

K. R. Chaudhuri and *B. P. Singh*, Advocates, for Respondent.

G.R.

Appeal allowed.

[SUPREME COURT.]

K. N. Wanchoo,
R. S. Bachawat and
V. Bhargava, JJ.
27th February, 1967.

Panna Lal v.
Murari Lal.
C.A. No. 866 of 1964.

Limitation Act (IX of 1908), Article 164—Interpretation of—Civil Procedure Code (V of 1908), Order 9, rule 13.

Under Article 164 of the Indian Limitation Act, 1908, the period of limitation for an application by a defendant for an order to set aside a decree passed *ex parte* was 30 days from "the date of the decree or when the summons was not duly served, when the applicant had knowledge of the decree". The onus is on the defendant to show that the application is within time and that he had knowledge of the decree within 30 days of the application. If the defendant produces some evidence to show that the application is within time, it is for the plaintiff to rebut this evidence and to establish satisfactorily that the defendant had knowledge of the decree more than 30 days before the date of the application.

In this case, in his application for setting aside the *ex parte* decree, the appellant stated that he got the information of the passing of the *ex parte* decree in Suit No. 25 of 1958 for the first time from the respondent on 13th April, 1959. It has been shown conclusively that this statement is false.

The appellant had thus on 16th August, 1958, clear knowledge of the decree passed against him in Suit No. 25 of 1958 which he now seeks to set aside. Time began to run against him from 16th August, 1958, under Article 164 of the Indian Limitation Act, 1908. The application filed by him on 16th April, 1959, was, therefore, clearly barred by limitation and was rightly dismissed by the Courts below.

S. G. Patwardhan, Senior Advocate, *Rameshwar Nath* and *Mohinder Narain*, Advocates of *M/s. Rajinder Narain & Co.* and *Prayag Das Agarwal*, Advocate, with him), for Appellant.

J. P. Goyal and *Raghunath Singh*, Advocates, for Respondents.

G.R.

Appeal dismissed.

[SUPREME COURT.]

K. N. Wanchoo,
R. S. Bachawat and
V. Bhargava, JJ.
28th February, 1967.

Rajendra Prasad Jain v.
Sheel Bhadra Yajee.
C.A. No. 1454 of 1966.

Representation of the People Act (XLIII of 1951), section 123—Meaning of the word 'Offer'.

An offer, it was urged, must be held to be made only when a specific sum is mentioned as the amount of bribe to be given and there is to be no negotiation about the amount. In this connection, learned Counsel referred to the meaning given to the word "offer" as explained in Halsbury's Laws of England, 3rd edition, Volume 8 at page 69. Halsbury, at that stage, deals with the meaning of the word "Offer" as used in connection with the law of contract; no assistance can be taken from the principle laid down therein. Reference was also made to some Indian cases dealing with the meaning of the word "offer" in connection with the offer of bribery under the Criminal Law. The case mainly relied upon was *Emperor v. Amiruddin Salebhoy Thabjee*, A.I.R. 1923 Bom. 44 where the accused was alleged to have used the words: "my cousin wishes to give you (a Government servant) Rs. 5,000." It was held that these words did not constitute an offer of bribery. That case is not at all parallel with the instant case. In that case, the accused himself did not offer any bribe and all that he did was to indicate to the Government servant that his cousin wanted to give to the Government servant the sum of Rs. 5,000. There was, thus, no direct offer by the accused of bribe to the Government servant.

The proposition suggested by learned Counsel that an offer of bribery cannot be held to be such unless a specific amount is mentioned in the offer cannot be accepted. No such requirement is laid down by law, and if it were accepted, it would lay the field open for corruption in such a manner as to make the provision totally ineffective. A candidate wanting to secure a vote by bribery can always go and first ask the voter whether he is prepared to accept money as a bribe and need offer a specific sum only after the voter has signified his assent. Once the voter actually accepts the offer, it is not likely that evidence of that instance of bribery will be available. The mere fact that a candidate goes and offers some money is enough to show that he has already made his offer to corrupt the voter and secure his vote, though there may still be a possibility that, if subsequently the negotiations as to the precise amount to be paid as bribe fail, he may not actually succeed in his objective. The offer of bribery in the manner proved in this case, clearly satisfies the requirements of section 123 of the Representation of the People Act. The decision of the High Court upholding that of the Election Tribunal setting aside the election of the appellant to the Rajya Sabha was therefore, right and must be upheld.

Veda Vyasa, Senior Advocate (K. K. Jain and R. Gopalakrishnan, Advocates, with him), for Appellant.

K. P. Varma and G. Goburdhan, Advocates, for Respondent No. 1.

G.R.

Appeal dismissed.

[SUPREME COURT.]

K. Subba Rao, C.J.

J. C. Shah,

S. M. Sikri,

V. Ramaswami and

C. A. Vaidialingam, J.J.

28th February, 1967.

The Moon Mills, Ltd. v.

M. R. Meher, President, Industrial Court,

Bombay.

C.A. No. 22 of 1966.

Bombay Industrial Relations Act, 1946 (XI of 1947), section 114 (2).

The instant case falls directly within the ratio of the decision of this Court in *Prakash Cotton Mills (P.), Ltd. v. The State of Bombay*, (1962) 1 S.C.R. 105; and it follows therefore that the award of Mr. Bhat, dated 25th April, 1958, is illegal and *tra vires* and the decision of the Labour Court dated 4th August, 1959 and of the Industrial Court, dated 24th October, 1959, must be quashed by grant of a writ of *certiorari*.

In the circumstances of this case, there is such acquiescence on the part of the appellant as to disentitle it to a grant of a writ under Article 226 of the Constitution. It is true that the issue of a writ of *certiorari* is largely a matter of sound discretion. It is also true that the writ will not be granted if there is such negligence or omission on the part of the applicant to assert his right as, taken in conjunction with the lapse of time and other circumstances, causes prejudice to the adverse party. The principle is to a great extent, though not identical with, similar to the exercise of discretion in the Court of Chancery. The principle has been clearly stated by Lord Barnes Peacock in *The Lindsay Petroleum Company v. Prosser Armstrong Hurd, Bram Farewell and John Kemp*, L.R. 5 P.C. 221, 239.

There is no such negligence or laches or acquiescence on the part of the appellant as may disentitle it to the grant of a writ.

For the reasons stated, the judgment of the Division Bench of the Bombay High Court, dated 6th February, 1962, must be set aside and the appellant must be granted a writ in the nature of *certiorari* for quashing the order of the Industrial Court, dated 24th October, 1959, and the appellant must be granted a writ in the nature of *certiorari* for quashing the order of the Industrial Court, dated 24th October, 1959, and of the Labour Court, dated 4th August, 1959.

This decision will not prejudice the trial of any references with respect to bonus which may be pending or which may hereafter be made between the appellant and its employees in respect of the years 1955 and 1956. If such reference are pending and should hereafter be made they will be proceeded with and decided in accordance with law.

S. T. Desai, Senior Advocate (B. Dutta, Advocate and O. C. Mathur, Advocate, of M/s. J. B. Dadachanji & Co., with him), for Appellant.

B. Sen, Senior Advocate (B. P. Maheshwari, Advocate, with him), for Respondent No. 2.

B. Sen, Senior Advocate (R. N. Sachthey, Advocate, with him), for Respondent No. 3.

G.R.

Appcal allowed.

[SUPREME COURT.]

K. N. Wanchoo,
R. S. Bachawat and
V. Bhargava, JJ.
1st March, 1967.

Bant Singh Gill v.
Shanti Devi
C.A. No. 2207 of 1966.

Delhi and Ajmer Rent Control Act (XXXVIII of 1952)—Delhi Rent Control Act (LIX of 1958), sections 52 (2), 57—Sections 33 and 34 of 1952 Act—The word 'Order' used in section 34 of the 1952 Act—Right of appeal under section 38 (1) of 1958 Act—Preliminary issue as to the maintainability of the suit.

Relying upon its decision in the case of *Central Bank of India, Ltd. v. Gokal Chand*, Civil Appeal No. 1339 of 1966, decided on 12th September, 1966, the Court held:—All that was done by the application presented by the appellant on the 13th March, 1961, was to raise a preliminary issue about the maintainability of the suit on the ground that the suit had abated by virtue of section 50 (2) of the Act of 1958. The Court went into that issue and decided it against the appellant. If the decision had been in favour of the appellant and the suit had been dismissed, no doubt there would have been a final order in the suit having the effect of a decree (see the decision of the Full Bench of the Lahore High Court in *Ram Charan Das v. Tira Nand*, A.I.R. 1948 Lah. 298). On the other hand, if, as in the present case, it is held that the suit has not abated and its trial is to continue, there is no final order deciding the rights or liabilities of the parties to the suit. The rights and liabilities have yet to be decided after full trial has been gone through. The decision by the Court is only in the nature of a finding on a preliminary issue on which would depend the maintainability of the suit. Such a finding cannot be held to be an order for purposes of section 34 of the Act of 1952, and, consequently, no appeal against such an order would be maintainable. It is clearly open to the appellant to raise this plea of abatement of the suit, if and when he files an appeal against a decree for eviction passed by the trial Court.

The application was in the nature of a request to the Court to decide a preliminary issue whether the suit had abated or was still maintainable, and to dismiss the suit on recording the finding that it had abated. The application was, therefore, one raising a preliminary issue as to the maintainability of the suit; and, in fact, the request for raising the issue was allowed by the trial Court by going into that issue and recording a finding. On that finding, the suit was clearly maintainable. Such a finding on a preliminary issue, which relates to the maintainability of a suit, is not an order of a nature against which an appeal can lie. The only remedy available to the appellant was, and still is, to challenge the correctness of the decision of the trial Court in the appeal against the decree, if passed against him.

Pritam Singh Safer, Advocate, for Appellant.

S. P. Mahajan and Miss Lily Thomas, Advocates, for Respondents.

G.R.

Appeal not maintainable.

[SUPREME COURT.]

K. Subba Rao, C.J.
J. C. Shah, S. M. Sikri,
V. Ramaswami and
C. A. Vaidialingam, JJ.
 2nd March, 1967.

Maneklal Chhotalal v.
M. G. Makwana.
 W. P. No. 64 of 1966.

Bombay Town Planning Act, 1954 (XXVII of 1955)—Gujarat Amendment and Validating Provisions of the Bombay Town Planning Act (Gujarat Act LII of 1963)—A draft town planning scheme—Seventh Schedule to the Constitution entries in Lists II and III—Bombay Town Planning Act (I of 1915), Articles 14, 19 (1) (f) & (g) and 31 of the Constitution.

Having due regard to the substantive and procedural aspects, the Act imposes only reasonable restrictions, in which case, it is saved under Article 19 (5) of the Constitution. The grievance of the petitioners that Article 14 is violated, is also not acceptable.

The petitioners, no doubt, urge that a very exorbitant price is being fixed by the Town Planning Officer regarding the value of the reconstituted plots allotted to them. Those are matters of detail, and they are covered by the provisions of the Act referred to above.

The petitioners, no doubt, make a grievance of their having lost a fairly large extent of land, which, according to them, amounts to deprivation. Their grievance is not well-founded in this regard. Though the petitioners may have originally owned larger extents of land, in different areas, which may or may not be fit for building purposes, there can be no controversy, that the reconstituted plots, though of a lesser area, have a higher value, as building sites, in view of the various improvements and amenities provided under the Town Planning Scheme. What parties, like the petitioners, may have lost in actual area of land, can certainly be considered to have been more than sufficiently compensated by the increased value of the reconstituted plots. There is no question of any deprivation of property, therefore, so as to attract Article 31.

The petitioners make a grievance that they have to pay fairly large amounts by way of contribution to the scheme. No doubt, the petitioners' stand appears to be that the amount collected or demanded is really a tax, or fee, at any rates which also the local authority has no right to ask for. Here again, the matter will have to be approached in an entirely different way. The amount that the petitioners have been asked to contribute is only towards the costs of the Scheme, which has to be incurred by the local authority. As to how exactly that contribution is to be worked out and the proportion in which the plots are to bear that burden, have all been indicated in the Act. Therefore, the liability of the petitioners to pay contribution has to be upheld, once it is held that the Act, as a whole will have to be sustained.

B. Sen, Senior Advocate (*Ticum'lal, J. Patel and I. N. Shroff*, Advocates, with him), for Petitioners.

H. D. Banajee, R. Ganapathy Iyer, R. H. Dhebar and S. P. Nayyar, Advocates, for Respondents Nos. 1, 3 and 4.

Purushottam Trikamdas, Senior Advocate (*Vithalbhai Patel*, Advocate, and *O. C. Mathur, J. B. Dadachanji* and *Rwinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him), for Respondent No. 2.

D. R. Prem, Senior Advocate (*S. P. Nayyar*, Advocate, with him), for Intervener.

G. R.

Petition dismissed.

[SUPREME COURT.]

K. N. Wanchoo,
R. S. Bachawat and
V. Bhargava, JJ.
2nd March, 1967.

Mulraj v.
Murti Raghunathji Maharaj;
C.A. No. 1938 of 1966.

U. P. (Temporary Control) of Rent and Eviction Act (III of 1947)—Civil Procedure Code (V of 1908), section 151 and Order 41, rule 5—Difference between order of stay and injunction and prohibitory order—Conflict of opinion between High Courts on the question of the effect of a stay order, particularly with reference to execution proceedings.

The view taken in *Bessesswari Chowdhurany v. Horro Sunder Mozumdar*, (1896 97) 1 C.W.N. 227; is the correct one. An order of stay in an execution matter is in the nature of a prohibitory order and is addressed to the Court that is carrying out execution. It is not of the same nature as an order allowing an appeal and quashing execution proceedings. That kind of order takes effect immediately it is passed, for such an order takes away the very jurisdiction of the Court executing the decree as there is nothing left to execute thereafter. But a mere order of stay of execution does not take away the jurisdiction of the Court. All that it does is to prohibit the Court from proceeding with the execution further, and the Court unless it knows of the order cannot be expected to carry it out. Therefore, till the order comes to the knowledge of the Court its jurisdiction to carry on execution is not affected by a stay order which must in the very nature of things be treated to be a prohibitory order directing the executing Court which continues to have jurisdiction to stay its hand till further orders.

It can hardly be said that the Court has lost jurisdiction because of some order of which it has no knowledge. This to our mind clearly follows from the words of Order 41, rule 5 of the Code of Civil Procedure which clearly lays down that mere filing of an appeal does not operate as stay of proceedings in execution, but the appellate Court has the power to stay the execution.

An order staying execution is not similar to an order allowing an appeal and quashing execution proceedings. In a case where the execution proceeding is quashed, the order takes effect immediately and there is nothing left to execute. But where a stay order is passed, execution still stands and can go on unless the Court executing the decree has knowledge of the stay order. It is only when the executing Court has knowledge of the stay order that the Court must stay its hands and anything it does thereafter would be a nullity so long as the stay order is in force.

What is said about execution proceedings applies with greater force to stay orders passed in transfer applications, as in the present case. In the case of execution proceedings at any rate there is an appeal in which a stay order is passed; the transfer proceedings are collateral proceedings and even though the superior authority may have the power to stay it cannot deprive the inferior authority having jurisdiction of the jurisdiction unless the inferior authority is apprised of the order by the superior authority.

Yogeshwar Prasad and S. S. Khanduja, Advocates, for Appellant.

Hardev Singh, Advocate, for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT.]

K. N. Wanchoo,
R. S. Bachawat and
V. Bhargava, JJ.
2nd March, 1967.

The Nagpur Electric Light and Power
Co., Ltd. v.
The Regional Director, Employees'
State Insurance Corporation.
C.As. Nos. 491 & 492 of 1965.

Employees' State Insurance Act (XXXIV of 1948), section 2 (9)—Definition of an employee in the Employees State Insurance Act is wider than that of a worker in the Factories Act.

The definition of "employee" in section 2 (9) deals with three classes of employees. We are concerned with the class of employees mentioned in section 2 (9) (i). The Courts below concurrently found, and rightly, that all the workers of the disputed categories are persons employed for wages in or in connection with work of the company's factory and are directly employed by the company on work of or incidental to or connected with the work of the factory. Some of them do the work in the factory and some work elsewhere, but they are all employees within the meaning of section 2 (9) (i).

The facts of the present case are entirely different. The company maintains one establishment for its factory. The factory does the work of transforming and transmitting electrical energy. All the workers in question including the clerks and the administrative staff are engaged in connection with this work. None of them is employed in any separate establishment unconnected with the work of the factory.

Some of the employees work outside the factory, but their duties are connected with the work of the factory. They are therefore employees within the meaning of section 2 (9) (i). Some are employed in the sub-stations. It is common case that the sub-stations are not independent factories. The sub-station attendants attend to work which is directly connected with the work of the factory at the main station. They are therefore employees within the meaning of section 2 (9) (i).

S. V. Gupte, Solicitor-General of India (I. N. Shroff, Advocate, with him), for Appellant (In C.A. No. 491 of 1965).

A. G. Ratnaparkhi, Advocate, for Appellants (In C.A. No. 492 of 1965).

Bishan Narain, Senior Advocate (M. L. Kapur and I. S. Sawhney, Advocates, with him), for Respondent (In C.A. No. 491 of 1965) and Respondent No. 2 (In C.A. No. 492 of 1965).

I. N. Shroff, Advocate, for Respondent No. 1 (In C.A. No. 492 of 1965).

G.R.

Appeals dismissed.

[SUPREME COURT.]

K. N. Wanchoo,
R. S. Bachawat and
V. Ramaswami, JJ.
6th March, 1967.

Sital Parshad v.
Kishori Lal.
C.A. No. 855 of 1964.

Civil Procedure Code, Order 34, rule 5—Preliminary decree under Article 181 of the Limitation Act—Difference of opinion amongst the High Courts on the question of law raised in the appeal.

There can be no doubt that if in appeal the preliminary decree is reversed, the final decree must fall to the ground for there is no preliminary decree thereafter in support of it. It is not necessary in such a case for the defendant to go to the Court passing the final decree and ask it to set aside the final decree. Even if the defendant does not make an application to the Court for setting aside the final decree within three years because the preliminary decree has been reversed, the decree-holder cannot get the right to execute the final decree which has no preliminary decree in support of it. If an execution petition is made on such a final decree even though more than three years after the decree in appeal has been reversed, the

defendant has simply to ask the Court where the execution petition is made to refuse to execute the decree on the ground that the preliminary decree in support of it has been set aside. In such a case it is the duty of the executing Court to take note of the fact that the preliminary decree in support of the final decree has been reversed and it should refuse to execute the final decree even though the fact is brought to its notice more than three years after the decree in appeal reversing the preliminary decree. In such a case in our opinion no question of limitation arises.

There are two main lines of decision in this matter. The first, which is in favour of the appellants is represented by *Ram Nath v. Deoki Nand Krishna*, A.I.R. 1947 All 40.

The leading case on the other side is *Periakaruppan Chettiar v. Venugopal Pillai*, I.L.R. (1947) Mad. 132.

The question before us in the present appeal therefore is which of these two views is correct.

The final decree in terms required no change in view of Form 6 already referred to and all that the executing Court had to do was to take note of the fact that the supporting preliminary decree had been varied and to execute the final decree in accordance therewith. In this view of the matter we are of opinion that the view taken in *Periakaruppan Chettiar's case*, I.L.R. 1947 Mad. 132, is correct subject to the modification where there are specific directions by the appellate Court in an appeal from the preliminary decree for preparation of fresh preliminary decree or for fixing a fresh time for payment.

It is unnecessary to refer in detail to other cases cited. It is enough to say that the Andhra Pradesh High Court has followed the Madras High Court : (see *Gandavarau Venkata Subba Rao v. Vavilal Kesavayya*, A.I.R. 1955 A.P. 254 ; while the Calcutta High Court in *Abdul Jalil v. Amar Chand Paul*, (1913) 18 Cal.L.J. 223 and the Lahore High Court in *Mewa Singh v. Tara Singh*, A.I.R. 1933 Lah. 859 seem to take the view that a fresh final decree is necessary within three years of the appellate decree in an appeal from the preliminary decree in a case of modification.

Rameshwar Dial and *A. D. Mathur*, Advocates, for Appellants.

B. G. Misra, Senior Advocate (*M. V. Goswami* and *S.S. Shukla*, Advocates), for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT.]

*K. Subba Rao, C.J., J.C. Shah,
J. M. Shelat, V. Bhargava and
G. K. Mitter, JJ.*
8th March, 1967.

*M/s. Haji Esmail Noor Mohd. & Co. v.
The Competent Officer, Lucknow.*
W.P.No. 14 of 1963.

Evacuee Interest (Separation) Act, (LXIV of 1951)—U.P. Ordinance (I of 1949), section 8—Administration of Evacuee Property Ordinance (XXVII of 1949)—Jurisdiction of the High Court under Article 226 of the Constitution.

It has now been well settled that under Article 226 of the Constitution, before it was amended, the High Court had no jurisdiction to issue a writ thereunder against a person or authority unless the person or authority resided or was located within the territorial jurisdiction of the appropriate High Court : see *Election Commission, India v. Saka Venkata Rao*, (1953) S.C.J. 293 : (1953) S.C.R. 1144 : A.I.R. 1953 S.C. 210 : *Khajoor Singh v. Union of India*, A.I.R. 1961 S.C. 532 : (1961) 2 S.C.R. 828. In the context of jurisdiction of the High Court to issue a writ of *certiorari* against orders made by a hierarchy of tribunals or authorities, two situations arise, namely, (i) where the order of an appellate authority or tribunal, has its office outside the territorial jurisdiction of the High Court, and (ii) where the order of the original authority within the territorial jurisdiction of the High Court merges with that of the appellate authority outside its territorial jurisdiction. In the former

use the appropriate High Court can issue a writ against the order of the original authority and in the latter it cannot; see *Thangal Kunju Musaliar v. Venkatachalam Potti* (1956) S.C.J. 323: (1955) 2 S.C.R. 1196; A.I.R. 1956 S.C. 246: *Collector of Customs v. East India Commercial Co., Ltd.*; (1963) 2 S.C.J. 230: (1963) 2 S.C.R. 563: A.I.R. 1963 S.C. 1124. *Shriram Jhunjhunwala v. The State of Bombay*, (1961) 2 S.C.J. 553: A.I.R. 1962 S.C. 670. The Supreme Court has also held that in all cases after the appellate authority has disposed of the appeal, the operative order was of the final authority whether it has reversed, modified or confirmed the original order: see *Collector of Customs v. East India Commercial Co., Ltd.*, (1963) 2 S.C.J. 230: (1963) 2 S.C.R. 563: A.I.R. 1963 S.C. 1124; Though Das, C.J., in the *State of U.P. v. Mohammad Nooh*, (1958) S.C.J. 242: (1958) S.C.R. 595, 610: A.I.R. 1958 S.C. 86; was not able to equate the orders made in departmental enquiries with decrees in civil Courts in the context of the doctrine of merger, this Court in *Collector of Customs, Calcutta v. East India Commercial Co., Ltd.*, (1963) 2 S.C.J. 230: (1963) 2 S.C.R. 563: A.I.R. 1963 S.C. 1124, distinguished that case.

In the result, the order of the High Court is set aside and the appeals are remanded to it for disposal in accordance with law. Costs will abide the result.

S. T. Desai, Senior Advocate, (*F. C. Agarwala*, *Bhawanilal Champat Rai* and *P. C. Agarwala*, Advocates, with him), for Petitioners (In W.P. No. 14 of 1963).

S. P. Sinha, Senior Advocate, (*F. C. Agarwala*, *Bhawanilal Champat Rai* and *P. C. Agarwala*, Advocates, with him), for Appellants (In both the Appeals).

N. S. Bindra, Senior Advocate, (*S. P. Nayyar*, Advocate, with him), for Respondents. (In W.P. No. 14 of 1963 and C. As. Nos. 1566 and 1567 of 1966).

G.R.

Remanded.

SUPREME COURT.]

K. N. Wanchoo, *R. S. Bachawat*, and
V. Ramaswami, JJ.
8th March, 1967.

Mangru Mahto v.
T. T. Tarkeshwar Nath.
C.As. Nos. 988 and 989 of 1964

Civil Procedure Code (V of 1908), Order 21, rules 58 and 63—Transfer of Property Act (IV of 1882), as amended in 1929, section 65-A.

On the merits, the question is whether the leases granted by Ramanandan Lal, while he was the mortgagor, in possession of the suit lands, were binding on the mortgagee Kashinath. The High Court held that the leases were in contravention of section 65-A of the Transfer of Property Act, 1882. Section 65-A was inserted in the Transfer of Property Act, 1882 by section 30 of the Transfer of Property (Amendment) Act, 1929, which came into force on 1st April, 1930. Section 63 of the Transfer of Property (Amendment) Act, 1929 provided that nothing in the provisions of section 30 of the amending Act would be deemed in any way to affect the 'terms or incidents of any transfer of property made or effected before the 1st day of April, 1930'. Now Kashinath was entitled to the rights of the mortgagees under the mortgages dated 10th February, 1886, 9th September, 1907, 5th February, 1910. All these mortgages were executed before 1st April, 1930 and nothing in section 65-A affected their incidents. The powers of the lessor to make leases binding on the mortgagees was an incident of the mortgages and was not affected by section 65-A. The validity of the leases granted by the mortgagor in June 1934 must be determined with reference to the law as it stood before the enactment of section 65-A.

The High Court held that the leases were sham transactions. We do not think it necessary to decide this question. Even assuming that the leases were not sham transactions they were not binding on Kashinath and the deity. The High Court rightly decreed the suit.

S—N.R.C.

D. Goburdhun, Advocate, for Appellants (In C.A. No. 988 of 1964).

S. C. Agarwal and *R. K. Garg*, Advocates of *M/s. Ramamurthi & Co.*, for Appellants (In C.A. No. 989 of 1964).

D. N. Mukherjee and *S. Mustafa*, Advocates, for Respondent, No. 1. (In both the Appeals).

G.R.

Appeal dismissed.

[SUPREME COURT.]

K. N. Wanchoo, *R.S. Bachawat*, and
V. Ramaswami, JJ.
9th March, 1967.

Madan Lal v.
Sunder Lal.
C.A. No. 990 of 1964.

Arbitration Act (X of 1940), sections 30 and 33—*Article 158 of the Limitation Act (IX of 1908)*.

The scheme of the Act is to divide arbitrations into three classes. The first consists of arbitration without intervention of a Court and is contained in Chapter II of the Act which has 17 sections from section 3 to section 19. The second consists of arbitration with intervention of a Court where there is no suit pending, which is in Chapter III of the Act, and there is only one section (section 20) therein, as sub-section (5) thereof applies the other provisions contained in the Act to this type of arbitration also so far as they can be made applicable. The third type of arbitration is contained in Chapter IV, namely, arbitration in suits. This chapter contains 5 sections, and section 25 thereof applies the other provisions of the Act so far as they can be made applicable.

This appeal must fail. Other points which were not pressed before the High Court, but, sought to be raised in the appeal were not permitted to be raised.

B. C. Misra, Senior Advocate, (*C. P. Lal*, Advocate, with him), for Appellant.

P. K. Chatterjee, Advocate, for Respondent No. 1.

S. P. Sinha, Senior Advocate, (*P. K. Chatterjee*, Advocate, with him), for Respondent No. 2.

G.R.

Appeal dismissed.

[END OF VOLUME (1967) 1 S.C.J. (Notes of Recent Cases).]

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO,
M. HIDAYATULLAH, J. G. SHAH AND S. M. SIKRI, JJ.

Badaku Joti Svant

.. Appellant*

v.

The State of Mysore

.. Respondent

The Attorney-General of India

.. Intervener.

Sea Customs Act (VIII of 1878), section 167 (81)—Interpretation—Import of gold forbidden by law—Person in possession of gold with foreign markings—Admittedly in custody thereof—Not concerned in actual import—Liability under section.

Central Excise and Salt Act (I of 1944), sections 19 and 21—Powers of arrest and interrogation conferred on Excise Officer—Excise Officer, if a 'Police Officer' thereby—Admission before such officer—Not hit by section 25 of the Evidence Act (I of 1872)—Admissible in evidence.

On the questions (i) whether the interpretation of section 167 (81) of the Sea Customs Act, 1878, by the Calcutta High Court in *Sitaram Agarwala v. State*, 1962 (2) CrL.J. 43, was correct, and, (ii) whether a Central Excise Officer investigating under section 21 of the Central Excise and Salt Act (I of 1944) is a 'Police Officer' within the meaning of the same in section 25 of the Evidence Act, 1872.

Held, the interpretation put by the Calcutta High Court on section 167 (81) of the Sea Customs Act is not correct; the section can also take in persons who may not be concerned in the actual import of prohibited goods (*vide*) *Sachidananda Banerjee v. Sitaram Agarwal*, (1966) 2 S.C.J. 111 : (1966) M.L.J. (CrL.) 486.

The Deputy Superintendent of Customs and Excise, before whom the accused admitted his having received the gold with foreign markings for safe custody from another in the course of the enquiry under section 21 of the Central Excise and Salt Act, cannot be held to be a 'Police Officer' so that the admission cannot be used in evidence. Though powers of inquiry had been conferred on him by section 21(1) and for the purpose of enquiry he has all the powers of the Officer-in-charge of a Police Station, it is only for the purpose of this inquiry which is, in substance, different from investigation pure and simple into an offence under the Criminal Procedure Code and the mere conferment of powers of investigation does not make the Central Excise Officer a 'Police Officer'.

The admission made before him during enquiry is not hit by section 25 of the Evidence Act, 1872. The conviction based thereon is correct.

Appeal from the Judgment and Order dated the 20th November, 1963, of the Mysore High Court in Criminal Appeal No. 49 of 1963.

B. R. L. Iyengar and A. G. Ratnaparkhi, Advocates, for Appellant.

A. K. Sen and D. R. Prem, Senior Advocates (R. H. Dhebar and B. R. G. K. Achar, Advocates, with them), for Respondent.

Niren De, Solicitor-General of India (B. R. G. K. Achar, Advocate, with him), for Intervener.

The Judgment of the Court was delivered by

Wanchoo, J. :—This is an appeal on a certificate granted by the Mysore High Court. The appellant was prosecuted under section 167 (81) of the Sea Customs Act (VIII of 1878) read with section 9 of the Land Customs Act (XIX of 1924). The appellant lives in a village which is close to Goa. The incident out of which the present appeal has arisen took place on 27th November, 1960, when Goa was not a part of India but was Portuguese territory. The Deputy Superintendent of Customs, Goa Frontier Division, Belgaum received information that contraband goods would be found in the house of the appellant. Consequently he raided the house in the company of three panchas. The appellant was not present in the house when the raid took place, but his mother and sister-in-law were there. After necessary formalities the house was searched and a big steel trunk, cane-box and

another steel trunk were taken down from the loft in the kitchen. On opening, a belt, with four pouches stitched to it, was found in the big steel trunk. Inside the pouches, four gold bars with foreign marks and labels of Goa Customs authorities were found. Besides these, a large sum of money and three small cut-pieces of gold were also found in the box. In the other two boxes also various sums of money in currency notes were found. The weight of the gold bars was 343 tolas.

On 30th November, 1960, the appellant was arrested and interrogated by the Deputy Superintendent of Customs and Excise. The answers given by him were reduced in writing and his signature was taken on the writing after it had been read over to him. During this interrogation, the appellant admitted that the four gold bars had been given to him on 27th November, 1960, in the morning by one Vithal Morajkar of Goa so that he might deliver them back to Morajkar on the motor-stand at Belgaum or near there, and he had kept them in his house. As the gold was foreign gold and as under the notification under section 8 (1) of the Foreign Exchange Regulation Act, 1947, import of gold into India had been forbidden except with the general or special permission of the Reserve Bank of India, the appellant was prosecuted on a complaint filed by the Assistant Collector of Central Excise and Land Customs, Goa Frontier Division, Belgaum.

The Magistrate convicted the appellant and sentenced him to imprisonment and fine and also ordered confiscation of the four gold bars. On appeal to the Sessions Judge, the appellant was acquitted relying on the decision of the Calcutta High Court in *Sitaram Agarwala v. State*¹. Then followed an appeal by the State to the High Court. The High Court disagreed with the view taken by the Calcutta High Court in *Sitaram Agarwala's case*¹, and held that even a person like the appellant who might have no direct concern with the import of gold in any way was liable under section 167 (81) of the Sea Customs Act. The High Court then considered the evidence and relying on the statement made by the appellant to the Deputy Superintendent of Customs and Excise and also on the other evidence produced in the case held that the appellant was guilty. In consequence, the acquittal of the appellant was set aside and the order of conviction and sentence passed by the Magistrate was restored. The appellant then applied to the High Court for a certificate to appeal to this Court, and as two questions of law of general importance arose in this case, the High Court granted the certificate. The two questions were: (i) whether the view taken by the High Court differing from the view taken by the Calcutta High Court in *Sitaram Agarwala's case*¹, with respect to the interpretation of section 167 (81) was correct, and (ii) whether the statement made by the appellant to the Deputy Superintendent of Customs and Excise was admissible in evidence in view of section 25 of the Indian Evidence Act (I of 1872). These are the two questions which have been argued before us on behalf of the appellant in the present appeal.

So far as the first question is concerned, namely, the interpretation of section 167 (81) of the Sea Customs Act, the matter is now settled by the decision of this Court in *Sachidananda Banerjee, Assistant Collector of Customs v. Sitaram Agarwala and another*². This Court has held therein that the interpretation put by the Calcutta High Court in the case of *Sitaram Agarwala*¹ is not correct and that section 167 (81) of the Sea Customs Act can also take in persons who may not be concerned with actual import of prohibited goods. The view taken by the Mysore High Court is in accordance with the view taken by this Court in that appeal and in view of that learned Counsel for the appellant has admitted that the appellant would be guilty within the meaning of section 167 (81) of the Sea Customs Act.

This leaves only the second question, and it has been urged on behalf of the appellant that a Central Excise Officer under the Central Excises and Salt Act (I of 1944) (hereinafter referred to as the Act) is a Police Officer within the meaning of those words in section 25 of the Evidence Act. Therefore even though the

1. (1962) 2 Cr.L.J. 43; A.I.R. 1962 Cal. 370. 2. (1966) 2 S.C.J. 111; (1966) M.L.J. (Cal.) 486.

Deputy Superintendent of Customs and Central Excise may have acted under the powers conferred on him by the Sea Customs Act, he was still a Police Officer, and the statement made to him by the appellant on 30th November, 1960, which is in the nature of a confession would be inadmissible under section 25 of the Evidence Act. It may be added that the High Court had in this connection relied on the judgment of this Court in the *State of Punjab v. Barkat Ram*¹, where it had been held by majority that a Customs Officer under the Sea Customs Act was not a Police Officer within the meaning of section 25 of the Evidence Act. The appellant however relies on a later decision of this Court in *Raja Ram Jaiswal v. State of Bihar*², where by majority it was held that an Excise Officer under the Bihar and Orissa Excise Act (II of 1915) was a Police Officer within the meaning of section 25 of the Evidence Act.

There has been difference of opinion among the High Courts in India as to the meaning of the words "Police Officer" used in section 25 of the Evidence Act. One view has been that those words must be construed in a broad way and all officers: whether they are Police Officers properly so-called or not would be Police Officers within the meaning of those words if they have all the powers of a Police Officer with respect to investigation of offences with which they are concerned. The leading case in support of this view is *Nanoo Sheikh Ahmed v. Emperor*³. The other view which may be called the narrow view is that the words "Police Officer" in section 25 of the Evidence Act mean a Police Officer properly so-called and do not include officers of other departments of Government who may be charged with the duty to investigate under special Acts special crimes thereunder like excise offences or customs offences, and so on. The leading case in support of this view is *Radha Kishan Marwari v. King Emperor*⁴. The other High Courts have followed one view or the other, the majority being in favour of the view taken by the Bombay High Court.

It is submitted on behalf of the appellant that the view taken by the Bombay High Court in *Nanoo Sheikh Ahmed*³, is the correct view and that the view of the Patna High Court in *Radha Kishan Marwari*⁴ is not correct. On the other hand it has been urged on behalf of the State that the view taken by the Patna High Court in *Radha Kishan Marwari*⁴ is the correct one. *Prima facie* there is in our opinion much to be said for the narrow view taken by the Patna High Court. But as we have come to the conclusion that even on the broad view, a Central Excise Officer under the Act is not a Police Officer, it is unnecessary to express a final opinion on the two views on the meaning of the words "Police Officer" in section 25 of the Evidence Act. We shall proceed on the assumption that the broad view may be accepted and that requires an examination of the various provisions of the Act to which we turn now.

The main purpose of the Act is to levy and collect excise duties and Central Excise Officers have been appointed thereunder for this main purpose. In order that they may carry out their duties in this behalf, powers have been conferred on them to see that duty is not evaded and persons guilty of evasion of duty are brought to book. Section 9 of the Act provides for punishment which may extend to imprisonment up to 6 months or to fine up to Rs. 2,000 or both where a person (a) contravenes any of the provisions of a notification issued under section 6 or of section 8, or of a rule made under clause (iii) of sub-section (2) of section 37; (b) evades the payment of any duty payable under the Act; (c) fails to supply any information which he is required by Rules made under the Act to supply or supplies false information; and (d) attempts to commit or abets the commission of any of the offences mentioned in clauses (a) and (b) above. Under section 13 of the Act, any Central Excise Officer duly empowered by the Central Government in this behalf may arrest any person whom he has reason to believe to be liable to punishment under the Act. Section 18 lays down that all searches made under the Act or any Rules made thereunder and all arrests made under the Act shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1898 relating respectively to searches and arrests made under that Code. Section 19 lays down that every person

1. (1962) 3 S.C.R. 338; A.I.R. 1962 S.C. 276.

2. (1964) 2 S.C.R. 752; A.I.R. 1964 S.C. 828.

3. (1927) I.L.R. 51 Bom. 78.

4. (1933) I.L.R. 12 Patna 46.

arrested under the Act shall be forwarded without delay to the nearest Central Excise Officer empowered to send persons so arrested to a Magistrate, or, if there is no such Central Excise Officer within a reasonable distance, to the officer-in-charge of the nearest Police Station. These sections clearly show that the powers of arrest and search conferred on Central Excise Officers are really in support of their main function of levy and collection of duty on excisable goods.

Strong reliance has however been placed on behalf of the appellant on section 21 of the Act, the material part of which runs thus :

"21. (1) When any person is forwarded under section 19 to a Central Excise Officer empowered to send persons so arrested to a Magistrate, the Central Excise Officer shall proceed to inquire into the charge against him.

(2) For this purpose the Central Excise Officer may exercise the same powers and shall be subject to the same provisions as the officer-in-charge of a Police Station may exercise and is subject to under the Code of Criminal Procedure, 1898, when investigating a cognizable case :

Provided that....."

It is urged that under sub-section (2) of section 21 a Central Excise Officer under the Act has all the powers of an officer-in-charge of a Police Station under Chapter XIV of the Code of Criminal Procedure and therefore he must be deemed to be a Police Officer within the meaning of those words in section 25 of the Evidence Act. It is true that sub-section (2) confers on the Central Excise Officer under the Act the same powers as an officer-in-charge of a Police Station has when investigating a cognizable case ; but this power is conferred for the purpose of sub-section (1) which gives power to a Central Excise Officer to whom any arrested person is forwarded to inquire into the charge against him. Thus under section 21 it is the duty of the Central Excise Officer to whom an arrested person is forwarded to inquire into the charge made against such person. Further under proviso (a) to sub-section (2) of section 21 of the Central Excise Officer is of opinion that there is sufficient evidence or reasonable ground of suspicion against the accused person, he shall either admit him to bail to appear before a Magistrate having jurisdiction in the case, or forward him in custody to such Magistrate. It does not however appear that a Central Excise Officer under the Act has power to submit a charge-sheet under section 173 of the Code of Criminal Procedure. Under section 190 of the Code of Criminal Procedure a Magistrate can take cognizance of any offence either (a) upon receiving a complaint of facts which constitute such offence, or (b) upon a report in writing of such facts made by any Police Officer, or (c) upon information received from any person other than a Police Officer, or upon his own knowledge or suspicion, that such offence has been committed. A Police Officer for purposes of clause (b) above can in our opinion only be a Police Officer properly so-called as the scheme of the Code of Criminal Procedure shows and it seems therefore that a Central Excise Officer will have to make a complaint under clause (a) above if he wants the Magistrate to take cognizance of an offence, for example, under section 9 of the Act. Thus though under sub-section (2) of section 21 the Central Excise Officer under the Act has the powers of an officer-in-charge of a Police Station when investigating a cognizable case, that is for the purpose of his inquiry under sub-section (1) of section 21. Section 21 is in terms different from section 78 (3) of the Bihar and Orissa Excise Act, 1915 which came to be considered in *Raja Ram Jaiswal's case*¹, and which provided in terms that :

"for the purposes of section 156 of the Code of Criminal Procedure, 1898, the area to which an Excise Officer empowered under section 77, sub-section (2), is appointed shall be deemed to be a Police Station, and such officer shall be deemed to be the officer-in-charge of such station "

It cannot therefore be said that the provision in section 21 is on par with the provision in section 78 (3) of the Bihar and Orissa Excise Act. All that section 21 provides is that for the purpose of his enquiry, a Central Excise Officer shall have the powers of an officer-in-charge of a Police Station when investigating a cognizable case. But even so it appears that these powers do not include the powers to submit a charge-sheet under section 173 of the Code of Criminal Procedure, for unlike

the Bihar and Orissa Excise Act, the Central Excise Officer is not deemed to be an officer-in-charge of a Police Station.

It has been urged before us that if we consider section 21 in the setting of section 14 of the Act, it would become clear that the enquiry contemplated under section 21 (1) is in substance different from investigation pure and simple into an offence under the Code of Criminal Procedure. It is not necessary to decide whether the enquiry under section 14 must also include enquiry mentioned in section 21 of the Act. Apart from this argument we are of the opinion that mere conferment of powers of investigation into criminal offences under section 9 of the Act does not make the Central Excise Officer a Police Officer even in the broader view mentioned above. Otherwise any person entrusted with investigation under section 202 of the Code of Criminal Procedure would become a Police Officer.

In any case unlike the provisions of section 78 (3) of the Bihar and Orissa Excise Act, 1915, section 21 (2) of the Act does not say that the Central Excise Officer shall be deemed to be an officer-in-charge of a Police Station and the area under his charge shall be deemed to be a Police Station. All that section 21 does is to give him certain powers to aid him in his enquiry. In these circumstances we are of opinion that even though the Central Excise Officer may have when making enquiries for purposes of the Act powers which an officer-in-charge of a Police Station has when investigating a cognizable offence, he does not thereby become a Police Officer even if we give the broader meaning to those words in section 25 of the Evidence Act. The scheme of the Act therefore being different from the Bihar and Orissa Excise Act, 1915, the appellant cannot take advantage of the decision of this Court in *Raja Ram Jaiswal's case*¹, taking even the broader view of the words "Police Officer" in section 25 of the Evidence Act. We are of opinion that the present case is more in accord with the case of *Barkat Ram*². In this view of the matter the statement made by the appellant to the Deputy Superintendent of Customs and Excise would not be hit by section 25 of the Evidence Act and would be admissible in evidence unless the appellant can take advantage of section 24 of the Evidence Act. As to that it was urged on behalf of the appellant in the High Court that the confessional statement was obtained by threats. This was not accepted by the High Court and therefore section 24 of the Evidence Act has no application in the present case. It is not disputed that if this statement is admissible, the conviction of the appellant is correct. As we have held that a Central Excise Officer is not a Police Officer within the meaning of those words in section 25 of the Evidence Act the appellant's statement is admissible. It is not ruled out by anything in section 24 of the Evidence Act and so the appellant's conviction is correct and the appeal must be dismissed. We hereby dismiss the appeal.

K. G. S.

Appeal dismissed

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, J.C. SHAH AND S.M. SIKRI, JJ.

Sundaram Finance Ltd.

.. *Appellant**

v.

The State of Kerala and another

.. *Respondents.*

Travancore-Cochin General Sales Tax Act (XI of 1925 M.E.), section 2 (j)—Hire-purchase agreement—Incidents of—Transaction entered into by execution of documents—If evidences a loan on security of goods or a hire-purchase agreement resulting in ultimate sale taxable under the Act—Determination of—Relevant factors—Court if can go behind the documents for ascertaining intention of parties.

By majority :—A hire-purchase agreement is normally one under which an owner hires goods to another party called the hirer and further agrees that the hirer shall have an option to purchase the chattel when he has paid a certain sum, or when the hire-rental payments have reached the hire-purchase price stipulated in the agreement. But there are variations when a financier is interposed

1. (1961) 2 S.C.R. 752 : A.I.R. 1964 S.C. 828. 2. (1962) 3 S.C.R. 388; A.I.R. 1962 S.C. 276.

*C.As. Nos. 673 to 677 of 1964.

30th November, 1965.

between the owner of the goods and the customer. The agreement, broadly takes one or the other of two forms : (1) when the owner is unwilling to look to the purchaser of goods to recover the balance of the price, and the financier who pays the balance undertakes the recovery. In this form, goods are purchased by the financier from the dealer and the financier obtains a hire-purchase agreement from the customer under which the latter becomes the owner of the goods on payment of all the instalments of the stipulated hire and exercising his option to purchase the goods on payment of a nominal price. (2) In the other form of transactions, goods are purchased by the customer, who in consideration of executing a hire-purchase agreement and allied documents remains in possession of the goods, subject to liability to pay the amount paid by the financier on his behalf to the owner or dealer and the financier obtains a hire purchase agreement which gives him a licence to seize the goods in the event of failure by the customer to abide by the conditions of the hire-purchase agreement.

The true effect of a transaction may be determined from the terms of the agreement considered in the light of the surrounding circumstances. In each case, the Court has, unless prohibited by statute, power to go behind the documents and to determine the nature of the transaction whatever may be the form of the documents. An owner of goods who purports absolutely to convey or acknowledge to have conveyed goods and subsequently purports to hire them under a hire-purchase agreement is not estopped from proving that the real bargain was a loan on the security of the goods. If there is a *bona fide* and completed sale of goods, evidenced by documents, anterior to and independent of a subsequent and distinct hiring to the vendor, the transaction may not be regarded as a loan transaction, even though the reason for which it was entered into was to raise money. If the real transaction is a loan of money secured by a right of seizure of the goods, the property ostensibly passes under the documents embodying the transaction, but subject to the terms of the hiring agreement which become part of the buyer's title, and confer a licence to seize. When a person desiring to purchase goods and not having sufficient money on hand borrows the amount needed from a third person and pays it over to the vendor, the transaction between the customer and the lender will undoubtedly be a loan transaction. The real character of the transaction would not be altered if the lender himself is the owner of the goods and the owner accepts the promise of the purchaser to pay the price or the balance remaining due against delivery of goods. But a hire-purchase agreement is a more complex transaction. The owner under the hire-purchase agreement enters into a transaction of hiring out goods on the terms and conditions set out in the agreement and the option to purchase exercisable by the customer on payment of all the instalments of hire arises when the instalments are paid and not before. In such a hire-purchase agreement there is no agreement to buy goods ; the hirer being under no legal obligation to buy, has an option either to return the goods or to become its owner by payment in full of the stipulated hire and the price for the option. This class of hire-purchase agreements must be distinguished from transactions in which the customer is the owner of the goods and with a view to finance his purchase he enters into an arrangement which is in the form of a hire-purchase agreement with the financier, but in substance evidences a loan transaction, subject to a hiring agreement under which the lender is given the licence to seize the goods.

The appellants were carrying on the business of financing purchases of motor vehicles on the security of those vehicles. The manner in which these transactions were effected is this : A customer desirous of purchasing a motor vehicle, but unable to pay the price to the dealer, agrees to purchase the vehicle and makes part payment of the price to the dealer. He then approaches the appellants and requests that a loan be advanced to him. On the appellants agreeing to grant a loan, the customer executes nine documents : (1) an application requesting the appellants to grant a loan of a stated amount on the security of the motor vehicle ; (2) a "sale letter" reciting that the customer had on the date of the application for loan sold to the appellants the motor vehicle ; (3) a bill which recites that for the amount mentioned in the "sale letter" and received in full, the customer has sold to the appellants the vehicle belonging to the customer ; (4) a receipt for the amount ; (5) an agreement called the hire-purchase agreement under which the appellants agree to let out to the customer and the customer agrees to take on hire the motor vehicle for a specified term subject to conditions mentioned therein one of which is that on the customer paying the entire amounts due to the dealer the vehicle shall become the sole property of the customer ; (6) a promissory-note agreeing to pay the difference between the price of the vehicle and the amount paid by the customer to the dealer ; (7) a letter from the customer requesting the appellants to pay to the dealer the amount agreed to be advanced to him ; (8) a letter addressed to the appellants agreeing and undertaking to keep the vehicle, on the security of which the loan was granted, insured against "comprehensive risks" and (9) a letter addressed to the Motor Vehicles Authorities intimating that the motor vehicle is the subject of hire-purchase agreement between the customer as owner and the appellants and requesting the authorities

make a note of the hire-purchase agreement in the registration certificate standing in the name of the customer. On the question of the real nature of the transaction evidenced by the nine documents, *Held*, (by majority with *Subba Rao, J.*, dissenting), the transactions were merely financing transactions. The intention of the appellants in obtaining the hire-purchase and the allied agreements was to secure the return of the loans advanced to their customers and no real sale of the vehicle was intended by the customer to the appellants. Consequently on the customer paying the entire amount due to the dealer there is only extinction of encumbrance and not a transfer of title which may be called a taxable under the Travancore-Cochin General Sales Tax Act.

The application for a loan and the letter addressed to the appellants undertaking to insure the vehicle expressly mention that a loan is asked for and granted on the security of the motor vehicle under the hire-purchase agreement. It is the customer who insures the vehicle and in the books of the Motor Vehicle Authorities he remains owner of the vehicle. The customer remains *qua* the world at large the owner and remains in possession and on condition of performing the covenants has a right to continue to remain in possession. The so-called "sale letter" is not made effective by registering the vehicle in the name of the appellants. Undue importance to the acknowledgment of sale in the "sale letter" and other documents cannot therefore be attached.

It is also to be noted that the hire-purchase agreement does not contemplate exercise of an option for payment of a nominal sum of money as is to be found in other hire-purchase agreements.

Appeals from the Judgment dated the 5th December, 1963 of the Kerala High Court in Original Petitions Nos. 1153, 1012, 1880, 1885 and 1886 of 1962.

A. V. Viswanatha Sastri, Senior Advocate, (*R. Ganapathy Iyer*, Advocate, with him), Appellant.

P. Govinda Menon and *M. R. Krishna Pillai*, Advocates, for Respondent No. 1.

The Court delivered the following Judgments

Subba Rao, J.—I regret my inability to agree. The facts of the case and the arguments of learned Counsel have been fully stated by my learned brother, *Shah, J.*, and I need not recapitulate them here.

The short question is whether the hire-purchase agreements entered into by the appellant with its customers are transactions of sale of goods or are only documents securing the return of the loans advanced by it to its customers.

It is common case that the said documents *ex facie* purported to be hire-purchase agreements and if that was their real character, in terms of the judgment of this Court in *Messrs. K. L. Johar & Co. v. The Deputy Commercial Tax Officer, Coimbatore III*¹, when all the terms of the agreements were satisfied and the option was exercised, sales take place in the goods which till then had been hired. The contention therefore, was that in executing the documents the common intention of the parties was that they should be documents securing the loans and that the form of hire-purchase agreement was adopted to achieve that purpose.

At the outset the nature of hire-purchase agreements may be briefly noticed. Hire-purchase agreements have come to stay as part of the social service in the commercial world. It enables persons of ordinary means to buy the necessities of life which the modern scientific advancement offers. Under that system one can buy a car, a refrigerator, furniture, cooking apparatus, and as a matter for that any article of utility. It enables the hirer to own the article of his choice by paying on easy instalments, and the dealer to provide it for him for profit without any risk to himself. It has become a common and familiar instrument of mercantile social service. *Simonds, J.*, in *Transport and General Credit Corporation Ltd. v. Morgan*², said :

"It must be remembered that hire-purchase agreements now play a very large part in the commercial and social life of the community and the financing of those hire-purchase agreements is an enormous business, both in the city of London and elsewhere. It appears to me that the financiers and the dealers co-operate in the common venture of making feasible the whole business of hire-purchase."

1. (1965) 1 S.C.J. 541 : (1965) 1 M.L.J. 1965 S.C. 1082.
2. (1939) 2 All.E.R. 17, 28.

agreements which is now, for good or for evil, a necessary part of our social life. To regard one party to that common venture, which is now a recognized mercantile service, as carrying on the business of a money-lender is, as I have said before, an abuse of language."

What is true of England is, to a lesser degree, true of India, particularly in the big cities of India.

Now, let us see how this system was evolved. At first the said transaction took place directly between a dealer and his customer: the dealer wanted to sell his goods and the buyer was not in a position to pay the entire sale price of the goods in one lump sum. The parties, therefore, entered into hire-purchase agreement whereunder the dealer continued to be the owner till the entire consideration was paid by the customer in terms of the agreement and till he had exercised his option to buy the goods covered by the said agreement. But the dealer was not always financially sound enough to wait till such time as all the instalments would be paid. The second stage in the evolution in the hire-purchase system was when a financier intervened between the dealer and the customer. The financier used to purchase goods from the dealer and then to enter into an agreement with the customer. At that stage the financier became the owner and the customer became the hirer till such time as he carried out the terms of the agreement. A further variation of the transaction was that the customer purchased the goods by paying the entire consideration to the dealer with the help of the financier; he then sold the goods to the financier and entered into an agreement of hire-purchase with him. In this type of transaction, the dealer went out of the picture altogether; the financier took the place of the dealer and the customer continued to be the hirer. Some times, as the present case illustrates, the customer might find some money but could not provide the whole consideration. In that event also, the transaction could be put through in the afore-said manner either with the dealer or the financier, as the case may be.

The object of the hire-purchase system was to help to finance the customer in order that he might purchase the property. Though that was the object, the transaction took the form of hire-purchase agreement. The main feature of the agreement, apart from small variations, was that the dealer or the financier continued to be the owner till the terms of the agreement were fully complied with by the customer and the option to purchase the same was exercised by him. If the terms were not complied with, the dealer or the financier, as the case may be, could terminate the agreement and take back the goods. In such a transaction, the common intention of the dealer, the financier and the customer was that the transaction should take the form of a hire-purchase agreement which would become a sale on the compliance of the terms of that agreement. No doubt the financing operation could have taken the form of a mortgage or pledge, but the parties, for their mutual benefit and convenience, entered into a hire-purchase transaction.

In the absence of any fraud or undue influence, the question resolves itself into a simple question of intention. The transactions were in accordance with the mercantile usage. Both the financier and the customers with open eyes entered into the transactions of hire-purchase. Their intention was expressed in clear terms. They could have executed hypothecation bonds, but they did not, and instead entered into hire-purchase transactions. There was no reason to camouflage the real nature of the transactions. None was suggested. They were, therefore, bound by the terms of the agreements.

The subtle distinction sought to be made between the transactions in question and other transactions are out of place; little clues have no bearing, as there was no attempt to camouflage the real nature of the transactions. It may be that the consideration was not the full value, but nothing prevented the owners from selling their cars for a smaller price, for they expected to get them back on their returning the amount in terms of the agreements. The circumstance that there was no express term for reconveying is not material, for the term that on the compliance of the terms of the agreement the hirer would become the owner would serve the same purpose.

The whole fallacy of the argument lies in the attempt to equate such commercial transactions with ordinary sales of property and agreements to evade statutory

provisions. It is true that in India there are reports replete with decisions where Courts attempted to find out the real intention of the parties when documents were executed to hide their real intention. There are also decisions, both in India and in England, where Courts applied various tests to find out the real intention of a document when it was executed to evade certain statutory provisions. These decisions have no bearing in the context of a hire-purchase agreement entered into in the course of business. All the parties knew the nature of the transaction and accepted the terms embodied thereunder.

In the present case the transactions were admittedly hire-purchase agreements. The financier purchased the cars for the amounts required to be paid to the dealer and entered into specific hire-purchase agreements with the customers. They contained all the usual terms that are found in a hire-purchase agreement. Neither the fact that the agreements were entered into because the customers had no funds to purchase the motor-cars nor the circumstance that part of the consideration was already paid to the dealer affects the nature of the transaction. The fact that the customer executed a promissory note for the money advanced by the financier does not affect the question, for that was merged in the hire-purchase transaction. If the said terms were not carried out, the customers could not claim any rights under the agreements and the financier continued to be the owner freed from any obligation created under the agreements. Can the financier thereafter enforce the promissory note? I think he cannot. As I have stated earlier, the transactions purported to be hire-purchase agreements and they must be treated as such, as the common intention of the parties was to enter into such transactions. A deeper scrutiny of the transactions shows that the dealer and the financier were closely connected companies and for their own reasons they have split up the business of hire-purchase between them. In effect and in substance, the dealer without receiving the whole money put the customers in possession of the cars under the hire-purchase agreements.

For the aforesaid reasons, I hold that if the agreements had fructified into sales, they were liable to sales tax. The High Court, in my view, gave a correct answer to the question propounded for its opinion.

In the result, the appeals fail and are dismissed with costs.

Shah, J. (On behalf of himself and *S. M. Sikri, J.*).—On 29th September, 1958 the Sales Tax Officer, First Circle, Ernakulam, issued a notice calling upon the appellants to file returns of their turnover from sales in the course of business and to secure registration as dealers under the Travancore-Cochin General Sales Tax Act (XI of 1125 M.E.) and to furnish details of the transactions of sale with parties in the State of Kerala in the years 1955-56, 1956-57 and 1957-58. A similar notice was issued by the Sales Tax Officer on 3rd March, 1962 in respect of the transactions within the State for the years 1958-59 and 1959-60. The appellants contended that they were not liable to be assessed under the Act. They contended that they were mere financiers and that they did not enter into any transactions of sale of goods with parties within the State of Kerala and that they were not “dealers” within the meaning of the Act. The Sales Tax Officer by orders dated 25th March, 1962 and 6th July, 1962 held that the transactions between the appellants and certain parties within the State of Kerala were sales within the meaning of the Act and the appellants were dealers liable to be assessed under the Act. The Sales Tax Officer accordingly reiterated his demand upon the appellants to file returns of their turnover in respect of sales for the five years in question along with details of all transactions in the State and “to produce evidence to prove the correctness and completeness of their returns”.

The appellants then moved the High Court of Kerala under Article 226 of the Constitution for writs of *certiorari* quashing the proceedings of the Sales Tax Officer and for writs of *prohibition* restraining that Officer from taking further proceedings against the appellants under his orders dated 25th March, 1962 and 6th July, 1962. The High Court of Kerala rejected these petitions upholding the view of the Sales Tax Officer that on the transactions between the appellants and their customers sales—

tax was payable under the Travancore-Cochin General Sales Tax Act. With certificate granted by the High Court under Article 133 (1) (a) of the Constitution, these appeals are preferred.

The appellants are a company incorporated under the Indian Companies Act, 1913, and have their registered office in Madras. The Company carries on business of financing purchases of motor vehicles on the security of those vehicles. The manner in which these transactions were effected is briefly this. A customer desirous of purchasing a motor-vehicle, but unable to pay the price to the dealer, agrees to purchase the vehicle, and makes part payment of the price to the dealer. He then approaches the appellants and requests that a loan be advanced to him. On the appellants' agreeing to grant a loan, the customer executes nine documents—(1) an application requesting the appellants to grant a loan of a stated amount on the security of the motor-vehicle; (2) a "sale letter" reciting that the customer had on the date of the application for loan sold to the appellants the motor-vehicle; (3) a bill which recites that for the amount mentioned in the "sale letter" and received in full, the customer has sold to the appellants the vehicle belonging to the customer; (4) a receipt for the appellants; (5) an agreement called the hire purchase agreement under which the appellants agree to let out to the customer and the customer agrees to take on hire the motor-vehicle for a specified term subject to determination in conditions mentioned therein; (6) a promissory note agreeing to pay the difference between the price of the vehicle and the amount paid by the customer to the dealer, and interest thereon at the stipulated rate; (7) a letter from the customer requesting the appellants to pay to the dealer the amount agreed to be advanced to him; (8) a letter addressed to the appellants agreeing and undertaking to keep the vehicle, on the security of which the loan was granted, insured against "comprehensive risks"; and (9) a letter addressed to the Motor Vehicles Authorities intimating that the motor-vehicle "is the subject of hire-purchase agreement between" the customer "as owner" and the appellants, and requesting the Authorities to "make a note of the hire-purchase agreement" in the registration certificate standing in the name of the customer. The scheme for financing the purchase of the vehicle is therefore that the customer purchases the vehicle from the dealer directly and gets it registered in his name. At his request the appellants agree to advance the balance of the price remaining to be paid, and pay it to the dealer on the customer's executing a promissory note for repayment of the amount, a hire-purchase agreement and other related documents. On repayment of the amount stipulated to be paid, the vehicle becomes the sole and absolute property of the customer.

The relevant terms of the hire-purchase agreement may now be set out. In the preamble of the agreement, it is recited that the agreement is between the appellants to be described as "the Owners" the customer to be described as "the Hirer" and "the Guarantor", who guarantees due performance and observance by the customer, of all the clauses and covenants of the agreement and agrees to pay on demand any monies due or which may become payable to the owners under the agreement either by way of hire expenses or damages, repairs, replacements or other supplies. By the first clause it is recited that the owners (the appellants) will let and the hirer (the customer) will take on hire the motor-vehicle for a specified number of calendar months subject to determination as mentioned in the agreement. Clause 2 sets out the conditions of hiring. Thereby the customer agrees to pay rent to the appellants punctually; to take proper care of the vehicle and keep it in good condition and to keep it insured for its full value; to pay all rents, rates, taxes payable by him in respect of the premises where the vehicle shall for the time being be garaged and all licence fees, insurance premium and other duties payable in respect of the said vehicle; to keep the vehicle in his sole custody and possession; and to permit the appellants to inspect the vehicle at all reasonable times during the hiring; not to cause, permit, allow or suffer any person to acquire any lien on the vehicle; not to cause, permit or allow or suffer the vehicle to become liable to distress, execution or any other process levied or issued against the customer; and not to assign,

l, pledge, charge, underlet, lend or otherwise part with the possession, custody beneficial interest in the vehicle of the customer therein under the agreement without the consent of the owners. By clause 3 all monies payable to the customer by y insurer for loss or damage to the motor vehicle are assigned to the owners. clause 4 sets out the conditions in which the agreement is to stand determined without any notice to the customer.

Those conditions are :

- (a) failure to pay any of the hiring instalments within the stipulated time ;
- (b) customer becoming insolvent or compounding with his creditors ;
- (c) customer pledging or selling or attempting to pledge or sell or otherwise encumber or transfer the vehicle ;
- (d) customers suffering any act or thing whereby or in consequence of which the vehicle may be distrained, seized or taken in execution under legal process ;
- (e) customer breaking or failing to perform or observe any conditions.

On the determination of the agreement all the instalments previously paid by the customer stand forfeited to the owners who shall thereupon be entitled to seize the vehicle and to sue for all the instalments due and for damages for breach of the agreement. Under clause 5 the customer has the option at any time to determine the agreement by delivering up the vehicle at his own cost to the owners, and by clause 6 the customer paying the entire amounts due under the second schedule, the vehicle becomes the sole and absolute property of the customer. By clause 7 it is provided that if the appellants seize the vehicle and take possession of it under clause 4, or if the customer returns it under clause 5, the customer shall remain liable to the appellants for arrears of the amounts of hire upto the date of such seizure or return. Under clause 8 it is agreed that the customer shall maintain registration of the vehicle in his own name, provided that the customer shall transfer the registration in the name of the appellants whenever required to do so by them, and especially when the customer commits a breach of any of the conditions of the agreement.

According to the sales tax authorities, between the date on which the customer agreed to purchase a vehicle and the date on which he became full owner of the vehicle without any encumbrance, three sale transactions were interposed: a sale by the dealer to the customer; a sale by the customer to the appellants under the "sale letter" referred to earlier; and a sale by virtue of clause 6 of the hire-purchase agreement. It is common ground that the first transaction is taxable under the appropriate Sales Tax Act. On behalf of the State of Kerala it is conceded that the second transaction is not taxable, but it is so because the customer is ordinarily not a dealer within the meaning of the Act, but they contend that inasmuch as under that transaction the appellants become transferees of the rights of the customer in the vehicle under the "sale letter", when by the operation of clause 6 of the hire-purchase agreement the rights of the appellants are extinguished, there results a sale in favour of the customer which is taxable under the Act. We are in this case concerned with the exigibility to tax of what the State of Kerala contends is a sale resulting from the payment of all the instalments under the hire-purchase agreement.

The appellants submit that execution of a "sale letter" by the customer acknowledging sale of the vehicle to them does not create in them any right of ownership, the "sale letter" being merely one of a set of documents under which arrangement for granting a loan and for ensuring repayment of the money advanced by the appellants is made. The appellants say that they do not become owners of the vehicle under the "sale letter", that the true effect of the transaction on the execution of the nine documents is to hypothecate the vehicle in favour of the appellants, that the vehicle continues to remain in the ownership of the customer, and that under clause 6 of the hire-purchase agreement there is extinction of encumbrance and not a transfer of title which may be called a sale taxable under the Travancore-Cochin General Sales Tax Act.

The Travancore-Cochin General Sales Tax Act (XI of 1125, M.E.) was brought into force in May, 1950. The State authorities had, it is conceded, no power to enact a statute for levying tax on a transaction which does not conform to the definition of 'sale' within the meaning of the Indian Sale of Goods Act: *State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd.*¹. The Travancore-Cochin General Sales Tax Act by section 2 (j) defines 'sale' as follows :

" 'sale' with all its grammatical variations and cognate expressions means every transfer of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration and includes also a transfer of property in goods involved in the execution of a works contract, but does not include a mortgage, hypothecation, charge or pledge ;

Explanation (1).—A transfer of goods on the hire purchase or other instalment system of payment shall, notwithstanding the fact that the seller retains the title in the goods as security for payment of the price, be deemed to be a sale.

Explanation (2).—

* * *

It is in the light of this definition that the liability to tax of the transactions resulting from clause 6 of the agreement falls to be determined. If, by the operation of clause 6, title to the vehicle is, under an existing contract, to sell, transferred to the customer for a price, the transaction is a sale, and is taxable.

The appellants are financiers and their business is to advance loans on favourable terms on the security of vehicles. This is effected by obtaining a promissory note for repayment of the amount advanced, and a hire-purchase agreement which provides a mechanism for recovery of the amount. It is true that a "sale letter" is obtained from the customer, but the consideration for the "sale letter" is only the balance remaining payable to the dealer, after giving credit against the price of the vehicle the amount paid by the customer. The application for a loan, and the letter addressed to the appellants undertaking to insure the vehicle expressly mention that a loan is asked for and granted on the security of the motor vehicle under the hire-purchase agreement. It is the customer who insures the vehicle, and in the books of the Motor Vehicle Authorities he remains, with the consent of the appellants, owner of the vehicle. Undue importance to the acknowledgment of sale in the "sale letter" and the recital of sale in the bill and in the receipt cannot therefore be attached. These documents—"sale letter", bill and receipt—must be read with the application for granting a loan on the security of the vehicles, the letter in which the customer requests the appellants to pay the balance of the price remaining to be paid by him to the dealer, the promissory note executed by him for that amount, the undertaking to insure the vehicle, and intimation to the Motor Vehicles Authorities to make note of the hire-purchase agreement.

The hire-purchase agreement executed by the customer undoubtedly contains several onerous covenants. The customer has to pay all rents, rates, taxes and other outgoings regularly, to take proper care of the vehicle, to get it insured, to keep it fully repaired, and not to assign, sell, pledge, charge, underlet, lend or otherwise to create any lien thereon. The hire-purchase agreement is liable to be determined if any of the eventualities mentioned in clause 4 of the agreement happens and the appellants have the right to seize the vehicle. These covenants are only material in considering the true intention of the parties entering into the hire-purchase agreement; it is irrelevant that in a given case these covenants may not be enforced by a Court in a dispute arising between the appellants and the customer, or relief may be granted on the ground that they contain penal clauses. In considering the true intention of the parties, the terms of clause 6 of the hire-purchase agreement are important: it is stipulated thereby that "Upon the Hirer (customer) paying the entire amount due under Second Schedule herein, the said vehicle shall become the sole and absolute property of the Hirer." The intention clearly disclosed thereby is that on payment of the amount due at any time after the hire-purchase agree-

1. (1958) S.C.J. 696 : (1958) 2 A.W.R. S.C.R. 379 : A.I.R. 1958 S.C. 560. (S.C.) 66 : (1958) 2 M.L.J. (S.C.) 66: (1959)

ent, the vehicle would be free from encumbrance. It is also to be noted that the agreement does not contemplate exercise of an option on payment of a nominal sum of money as is to be found in other hire-purchase agreements. Execution of the promissory-note, the hire-purchase agreement and the other documents, in our judgment, indicate that it was the intention of the parties not to transfer any interest in the vehicle by the customer to the appellants: it was intended to give security by hypothecating the vehicle in favour of the appellants and for ensuring payment of the loan advanced that the customer submitted to the various onerous conditions of the hire-purchase agreement.

A hire-purchase agreement is normally one under which an owner hires goods to another party called the hirer and further agrees that the hirer shall have an option to purchase the chattel when he has paid a certain sum, or when the hire-purchase payments have reached the hire-purchase price stipulated in the agreement. But there are variations when a financier is interposed between the owner of the goods and the customer. The agreement, ignoring variations of detail, broadly takes one of the other of two forms: (1) when the owner is unwilling to look to the purchaser of goods to recover the balance of the price, and the financier who pays the balance undertakes the recovery. In this form, goods are purchased by the financier from the dealer, and the financier obtains a hire-purchase agreement from the customer under which the latter becomes the owner of the goods on payment of all the instalments of the stipulated hire and exercising his option to purchase the goods on payment of a nominal price. The decision of this Court in *K. L. Johar & Co. v. Deputy Commercial Tax Officer*¹, dealt with a transaction of this character. (2) In the other form of transactions, goods are purchased by the customer, who in consideration of executing a hire-purchase agreement and allied documents remains in possession of the goods, subject to liability to pay the amount paid by the financier on his behalf to the owner or dealer, and the financier obtains a hire-purchase agreement which gives him a licence to seize the goods in the event of failure by the customer to abide by the conditions of the hire-purchase agreement.

The true effect of a transaction may be determined from the terms of the agreement considered in the light of the surrounding circumstances. In each case, the Court has, unless prohibited by statute, power to go behind the documents and to determine the nature of the transaction, whatever may be the form of the documents. An owner of goods who purports absolutely to convey or acknowledges to have conveyed goods and subsequently purports to hire them under a hire-purchase agreement is not estopped from proving that the real bargain was a loan on the security of the goods. If there is a *bona fide* and completed sale of goods, evidenced by documents, anterior to and independent of a subsequent and distinct hiring to the vendor, the transaction may not be regarded as a loan transaction, even though the reason for which it was entered into was to raise money. If the real transaction is a loan of money secured by a right of seizure of the goods, the property ostensibly passes under the documents embodying the transaction, but subject to the terms of the hiring agreement, which become part of the buyer's title, and confer a licence to seize. When a person desiring to purchase goods and not having sufficient money in hand borrows the amount needed from a third person and pays it over to the lender, the transaction between the customer and the lender will unquestionably be a loan transaction. The real character of the transaction would not be altered if the lender himself is the owner of the goods and the owner accepts the promise of the purchaser to pay the price or the balance remaining due against delivery of goods. But a hire-purchase agreement is a more complex transaction. The owner under the hire-purchase agreement enters into a transaction of hiring out goods on the terms and conditions set out in the agreement, and the option to purchase exercisable by the customer on payment of all the instalments of hire arises when the instalments are paid and not before. In such a hire-purchase agreement there is no agreement to buy goods; the hirer being under no legal obligation to buy, has an option

¹ (1965) 1 S.C.J. 541 : (1965) 1 M.L.J. 1965 S.C. 1082.
S.G. 95 : (1965) 1 An.W.R. (S.C.) 95 : A.I.R.

either to return the goods or to become its owner by payment in full of the stipulated hire and the price for exercising the option. This class of hire-purchase agreements must be distinguished from transactions in which the customer is the owner of the goods and with a view to finance his purchase he enters into an arrangement which is in the form of a hire-purchase agreement with the financier, but in substance evidences a loan transaction, subject to a hiring agreement under which the lender is given the licence to seize the goods.

A few illustrative cases decided by the Courts in England, which do not import complications arising from the Bills of Sale Act, 1878, and the Hire Purchase Act, 1938, may be briefly noticed. In *Re Watson Ex Parte Official Receiver in Bankruptcy*¹, it was held that in adjudging the true nature of a transaction purporting to be a sale of personal chattels, followed by a hiring and purchase agreements, whereby the vendor agreed to hire the chattels from the purchaser and to pay quarterly sums for such hire, until a certain amount was paid, when the chattels, were to become again the property of the vendor, and power was given to the purchaser to take possession of the chattels on default of payment, the form of the transaction cannot be given undue importance. The Court held that no sale or hiring of the chattel was intended, the object in truth being to create a security for a loan of money to the supposed vendor from the supposed purchaser. The transaction was therefore one of loan. Lord Esher, M. R., observed at page 37:

"... when the transaction is in truth merely a loan transaction, and the lender is to be repaid his loan and to have a security upon the goods, it will be unavailing to cloak the reality of the transaction by sham purchase and hiring. It will be a question of fact in each case whether there is a real purchase and sale complete before the hiring agreement. If there be such a purchase and sale in fact and afterwards the goods are hired, the case is not within the Bills of Sale Act."

The document itself must be looked at as part of the evidence; but it is only part, and the Court must look at the other facts, and ascertain the actual truth of the case."

In *Mass v. Pepper*², one M entered into a contract with a wine merchant under which the latter was to provide £2,000 for purchasing the furniture of a hotel which was agreed to be purchased by M. The wine merchant paid £2000 to the vendor who gave a receipt for that sum as part of a purchase money of the furniture. M then executed a hire-purchase agreement in favour of the wine merchant and the wine merchant let the furniture to M to be paid for by instalments and the furniture not to become property of M till all the instalments were paid. It was held by the House of Lords that the circumstances showed that the transaction was merely colourable and was a loan on the security of the hire-purchase agreement.

In *Polsky v. S. and A. Services*³, the plaintiff purchased a motor-car and gave a cheque for the price. Being unable to make arrangement for the cheque, he entered into a transaction with the defendants who carried on the business of financing the purchase of motor-cars. Though the plaintiff had purchased the motor-car, and merely sought a loan, the transaction between him and the defendants was carried out by means of documents used by the defendants when financing purchase of motor-cars, and they purported to buy the motor-car from the plaintiff and to let it out to him under a hire-purchase agreement. The plaintiff then brought an action for a declaration claiming that hire-purchase agreement was void under the Bills of Sale Act, 1882. Lord Goddard, C.J., in upholding the claim of the plaintiff observed at page 188:

"A considerable number of cases were cited... on the point which may, I think, be conveniently divided into two lines of authority. There is on the one hand, the class of cases, of which *Yorkshire Railway Wagon Co. v. Maclure*⁴ and *British Railway Traffic & Electric Co. v. Kahn*⁵ are good examples, where the transaction in question has been held to be a genuine sale followed by a hire-purchase agreement, and, therefore, unaffected by the Bills of Sale Acts, and, on the other hand, there is the class, which includes *Re Watson, Ex. P. Official Receiver in Bankruptcy*¹ and *Madell v. Thomas & Co.*⁶ where the Court has held, on facts not very dissimilar from those in the present case, that the real transaction was one of loan, and, therefore, it was avoided by reason of the Acts. There is no doubt, I think as to the deciding principle. The Court has to determine whether the transaction in question is a genuine

1. L.R. (1890) 25 Q.B.D. 27.

2. L.R. (1945) A.C. 102.

3. (1951) 1 All.E.R. 185.

4. L.R. (1882) Ch. D. 309.

5. (1921) W.N. 52.

6. L.R. (1891) 1 Q.B. 230.

sale by the original owner of the chattel to the person who is finding the money and a genuine re-letting by the latter to the original owner on hire-purchase terms, or whether the transaction, though taking that form, is nothing more than a loan of money on the security of the goods..... The Court is not to look merely at the documents. It must discover what the real transaction was. As Lord Esher, M.R., said in *Madell v. Thomas & Co.*¹

“..... the Court is to look through or behind the documents, and to get at the reality; and, if in reality the documents are only given as a security for money, then they are bills of sale.”

In the light of these principles the true nature of the transactions of the appellants may now be stated. The appellants are carrying on the business of financiers: they are not dealing in motor vehicles. The motor vehicle purchased by the customer is registered in the name of the customer and remains at all material times so registered in his name. In the letter taken from the customer under which the latter agrees to keep the vehicle insured, it is expressly recited that the vehicle has been given as security for the loan advanced by the appellants. As a security for repayment of the loan, the customer executes a promissory note for the amount paid by the appellants to the dealer of the vehicle. The so-called “sale letter” is a formal document which is not made effective by registering the vehicle in the name of the appellants and even the insurance of the vehicle has to be effected as if the customer is the owner. Their right to seize the vehicle is merely a licence to ensure compliance with the terms of the hire-purchase agreement. The customer remains *qua* the world at large the owner and remains in possession, and on condition of performing the covenants has a right to continue to remain in possession. The right of the appellants may be extinguished by payment of the amount due to them under the terms of the hire-purchase agreement even before the dates fixed for payment. The agreement undoubtedly contains several onerous covenants, but they are all intended to secure to the appellants recovery of the amount advanced. We are accordingly of the view that the intention of the appellants in obtaining the hire-purchase and the allied agreements was to secure the return of loans advanced to their customers, and no real sale of the vehicle was intended by the customer to the appellants. The transactions were merely financing transactions.

The appeals will therefore be allowed with costs in this Court and the High Court. One hearing fee.

ORDER OF THE COURT.—In accordance with the opinion of the majority, the appeals are allowed with costs in this Court and the High Court. One hearing fee.

V. K.

Appeals allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—K. SUBBA RAO, J. C. SHAH AND S. M. SIKRI, JJ.

The State of Madhya Pradesh (now Maharashtra)

.. *Appellant**

v.

Haji Hasan Dada

.. *Respondent.*

G.P. and Berar Sales Tax Act (XXI of 1947) (before amendment by Act XX of 1953)—Scope—Claim for refund of tax assessed and paid alleged to be in excess of amount due—Assessment order not set aside or modified—If can be entertained by the assessing officer (Assistant Commissioner).

Section 13, G. P. and Berar Sales Tax Act, 1947 before it was amended in 1953, in terms authorised the Commissioner to grant refund to a registered dealer applying in that behalf of any amount of tax or penalty paid by him in excess of the amount due by him under the Act. That section implies that refund may be granted only of the amount which is not lawfully due. The order of the Assistant Commissioner making the assessment is undoubtedly not final; it is liable to be set aside in appeal or modified in revision under the provisions of the Act. But so long as the order of assessment made by him is not so set aside or modified a dealer cannot call upon him to ignore the previous order of assessment and grant refund contrary to the plain direction of that order.

Under the Act the Assistant Commissioner—who exercises the powers of the Commissioner—has no power to review his decision nor is he authorised to ignore his previous order which has not been

set aside by appropriate proceedings or to pass an order for refund inconsistent therewith. Full effect must be given to an order of assessment, even if it be latter found that the order was erroneous in law.

The application for refund of tax (in the instant case) was, therefore not maintainable under section 13 of the Act of 1947.

G.I.T. Punjab, etc. v. Tribune Trust, Lahore, (1948) 2 M.L.J. 14 : L.R. 74 I.A. 306, Rel. on.

State of Bombay v. Purushothamdas Dwarkadas, (1957) 8 S.T.C. 379 (disapproving *Sheikh Gauhar Sheikh Nazir case*, (1952) 3 S.T.C. 331, approved).

Appeal by Special Leave from the Judgment and Order dated the 13th September, 1961, of the Bombay High Court (Nagpur Bench) at Nagpur, in Civil Reference No. 1 of 1961.

T. V. R. Tatachari and B. R. G. K. Achar, Advocates, for Appellant.

The Judgment of the Court was delivered by

Shah, J.—By order dated 17th April, 1952, the respondent Haji Hasan Dada was assessed by the Assistant Commissioner of Sales Tax, Nagpur Region, to pay tax under the Central Provinces and Berar Sales Tax Act XXI of 1947 on the turnover from his business in yarn for the period 13th November, 1947 to 1st November, 1948. The respondent paid the amount of tax assessed on 8th July, 1952. Thereafter relying upon section 13 of the C. P. and Berar Sales Tax Act, 1947 he applied on 20th November, 1952, to the Assistant Commissioner of Sales Tax for an order of refunding Rs. 873-10-0 on the plea that in the turnover of his business were included dyeing charges which were not taxable under the Act, and which since the order of assessment were held by the Board of Revenue to be not taxable. The Assistant Commissioner rejected the application, and the order was confirmed by the Commissioner of Sales Tax in appeal. The Board of Revenue, Madhya Pradesh however, set aside the order and ordered that the case be returned to the Commissioner "for disposal afresh in the light of the legal principles explained in *Sheikh Gauhar Sheikh Nazir of Balaghat v. The State*".

During the pendency of the proceedings before the taxing authorities, section 13 of the Act was amended with retrospective effect. It is claimed by the State that under the amended section the right to obtain refund in cases similar to those under examination was taken away retrospectively.

The State of Madhya Pradesh moved the Board of Revenue for a reference under section 23 of the Act to the High Court, and the Board of Revenue referred the following three questions :

1. Is ruling 57 (in *Sheikh Gauhar's case*¹) good law ? In other words, was the Board right in holding that the Privy Council's decision in *Commissioner of Income-tax v. Tribune Trust*² constituted no bar to the examination on merits of claims for refund made under the original section 13 of the Sales Tax Act (XXI of 1947) within the time-limit mentioned in it ?
2. Has section 24 of Act XX of 1953 been validly enacted, in so far as it seeks to give retrospective effect to the amended section 13 of Act XXI of 1947—as from the very commencement of the latter on 1st June, 1947 ? and
3. If the answer to Question No. 2 is in the affirmative, does sub-section (3) of the new section 13 constitute a bar to the examination on merits of the claim for refund made by the assessee in the present case ?

The High Court held that by section 13 of the Act as originally enacted, the respondent had "a valuable right to ask for refund of the amount of the tax paid by him in excess of the amount lawfully due" and that "the right to obtain a refund being a substantive right given to the respondent by the statute and not being a matter of mere procedure," this right could not be taken away except by clear and unambiguous words, and section 13 as amended was not legislation which satisfied that test. The High Court accordingly answered the questions as follows :

1. Ruling No. 57 is good law, and, in our opinion, the Board was right.
2. Section 24 of Act XX of 1953 has been validly enacted.
3. The new section 13, sub-section (3), does not bar an examination on merits of the claim for refund made on 20th November, 1952, by the assessee."

1. (1952) 3 S.T.C. 331.

2. (1948) 2 M.L.J. 14 : L.R. 74 I.A. 206 :

A.I.R. 1948 P.C. 102.

th Special Leave, the State of Maharashtra, upon whom the rights of the State Madhya Pradesh have devolved by virtue of the States Reorganisation Act, 1956 s appealed to this Court.

We are of the view that the first question alone need be answered in this appeal, and on the answer we propose to record the claim made by the respondent must be rejected. Section 13 of the Act, as originally enacted, and which applied during the year of assessment, read as follows :

"The Commissioner shall, in the prescribed manner and either by cash payment or, at the option of the dealer, by deduction of such excess from the amount of tax due in respect of any other period, and to a registered dealer applying in this behalf any amount of tax or penalty paid by such dealer in excess of the amount due from him under this Act :

Provided that no claim for refund shall be allowed unless it is made within twelve months from the date on which the order of assessment with or without penalty was passed or within six months from the date on which the final order is passed on appeal, revision, review or reference in respect of the order of assessment with or without penalty."

The amendment to section 13 by Act XX of 1953 need not, for reasons already set out, be considered.

Section 13, in terms authorised the Commissioner to grant refund to a registered dealer applying in that behalf, of any amount of tax or penalty paid by such dealer in excess of the amount due from him under the Act. The section implies that refund may be granted only of the amount which is not lawfully due, and whether a certain amount is lawfully due or not, must be determined by the Assistant Commissioner in making the order of assessment or re-assessment. The order of the Assistant Commissioner is undoubtedly not final ; it is liable to be set aside in appeal or modified in a revision application under the provisions of the Act. But so long as the order passed by the Assistant Commissioner is not so set aside or modified, a dealer cannot call upon him to ignore the previous order, and grant refund contrary to the plain direction of the order.

There is abundant authority for the view that until it is set aside by appropriate proceedings under the Act which authorises the levy of tax, full effect must be given to an order of assessment, even if it be later found that the order was erroneous in law : e.g. *Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces, Lahore v. Tribune Trust, Lahore*¹. In that case the Trust which had been in previous years assessed to, and had paid, income-tax, claimed in respect of its assessment for the year 1932-33 that it was exempt from taxation. In appeal which was carried to the Judicial Committee, the contention was upheld. Before the judgment of the Judicial Committee was pronounced, assessments to income-tax were made on the Trust for the years 1933-34 to 1938-39. After the Board's decision, the Trust applied to the Commissioner of Income-tax for an order for refund of income-tax. The High Court of Lahore held in a reference under section 66 (3) of the Indian Income-tax Act, that the assessments made for the years 1933-34 to 1938-39 "were nullity", and that the Trust could not be denied the relief. The Judicial Committee reversed the order of the High Court and held that the assessments which were duly made by the Income-tax Officer in the proper exercise of his duty were validly made and were effective until they were set aside.

The Assistant Commissioner appointed under the Act is within the limits of his jurisdiction and authority competent to decide all the questions which arise before him : his orders, it is true, are liable to be set aside in appeal or modified in revision as provided by the Act. But under the Act the Assistant Commissioner—so exercises the powers of the Commissioner—has no power to review his decision, nor is he authorised to ignore his previous order, and to pass an order for refund consistent with his previous order which has not been set aside by appropriate proceedings.

It is somewhat unfortunate that a later decision of the Bombay High Court in *State of Bombay v. Purshottamdas Dwarkadas Patel*²—a case arising under section 13

1. (1947) L.R. 74 I.A. 306 : (1948) 2 M.L.J. 2. (1957) 8 S.T.C. 379.
: A.I.R. 1948 P.C. 102.

of the Bombay Sales Tax Act, 1946—which decided the identical question which arose in this appeal, was not brought to the notice of the High Court. In that case it was held by the High Court that an application for refund of sales tax paid under an order of assessment cannot be entertained by the Sales Tax Officer on the plea that the order was made on an erroneous view of the law, unless the order was set aside in appropriate proceedings by way of appeal or revision. The Court in that case in a reference made under the Bombay Sales Tax Act disapproved of the view of the Board of Revenue which had in arriving at its decision followed the precedent in *Sheikh Gauhar Sheikh Nazir's case*¹.

Application for refund of tax was, therefore, not maintainable under section 13 of the C. P. and Berar Sales Tax Act, 1947, as originally framed.

The appeal must therefore be allowed. The parties to bear their own costs in this Court and in the High Court.

K.S.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—A. K. SARKAR AND J. R. MUDHOLKAR, JJ.

The State of Maharashtra

*Appellant**

v.

Jugminder Lal

Respondent.

Suppression of Immoral Traffic in Women and Girls Act (GIV of 1956), section 3 (i)—Conviction under—Imposition of sentence of imprisonment in addition to fine obligatory—No discretion to award fine alone.

It is obligatory upon the Court which convicts a person of an offence under section 3 (i) of the Suppression of Immoral Traffic in Women and Girls Act, 1956, to pass the minimum sentence of imprisonment prescribed therein, in addition to a sentence of fine and no discretion is vested in the Court to impose a sentence of fine alone.

The contention that the word "punishable" in section 3 (i) instead of the word "punished" necessarily postulates a certain discretion on the Court to impose a sentence of imprisonment or a sentence of fine or both is untenable. The mere use of the word "punished" or the word "punishable" is not determinative of the intention of the Legislature to empower the Court to select one or more kinds of sentences prescribed by it or to making it obligatory upon it to pass a particular sentence or sentences so prescribed. The expression "punishable" means liable to punishment. Liable to punishment only means that a person who has contravened a penal provision will have to be punished. Thus it does not mean anything different from "shall be punished". Punishment is obligatory in either case. But the nature and extent of the punishment to be awarded has to be ascertained by a consideration of the whole of the penal provision.

In the context in which the word "punishable" has been used in section 3 (i) it is impossible to construe it as giving any discretion to the Court in the matter of determining the nature of sentences to be passed in respect of a contravention of the provision. By using the expression "shall be punishable" the Legislature has made it clear that the offender shall not escape the penal consequences. What the consequences are to be are then specified in the provision and they are rigorous imprisonment for a period not less than one year and not more than three years and also a fine which may extend to Rs. 2,000. These are the punishments with respect to a first offence and higher punishments are prescribed in respect of a subsequent offence. By saying that a person convicted of the offence shall be sentenced to imprisonment of not less than one year the Legislature has made it clear that its command is to award a sentence of imprisonment in every case of conviction. It is difficult to conceive of clearer language for couching such command.

Emperor v. Peter D'Souza, A.I.R. 1949 Bom. 41 (F.B.), disapproved.

Appeal by Special Leave from the Judgment and Order dated the 11th/12th November, 1963 of the Bombay High Court in Criminal Appeal No. 661 of 1963 with Criminal Revision No. 917 of 1963.

N. S. Bindra, Senior Advocate, (*B. R. G. K. Achar*, Advocate, with him), for Appellant.

R. K. Garg and *U. P. Singh*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Mudholkar, J.:—In this appeal by Special Leave from a judgment of the High Court of Bombay the short point for consideration is whether it is obligatory upon the Court which convicts a person of an offence under section 3 (1) of the Suppression of Immoral Traffic in Women and Girls Act, 1956 to pass a sentence of imprisonment where the conviction is, in respect of a first offence, for a term not less than one year and not merely to a sentence of fine. The Presidency Magistrate, Bombay, held the respondent guilty of an offence under section 3 (1) of the Act for keeping a brothel or allowing the premises in his occupation to be used as a brothel and passed a sentence of fine of Rs. 1,500 but did not pass a sentence of imprisonment. The respondent was also found guilty of an offence under section 4 (1) of the Act for living on the earning of prostitution and sentenced by him to pay a fine of Rs. 500. The respondent challenged his conviction in respect of each of the two offences as well as the sentences awarded to him. The High Court affirmed his conviction for these offences. The State preferred an application for revision before the High Court for enhancement of the sentences which was heard along with the appeal. It was contended on behalf of the State that it was obligatory on the part of the Magistrate to pass the minimum sentence of imprisonment against the respondent in respect of the offence as provided under section 3 (1) of the Act. It was also contended that though there was no obligation on the Magistrate to pass a sentence of imprisonment in respect of the offence under section 4 (1) of the Act, the sentence awarded by him was inadequate. The High Court enhanced the sentence of fine in respect of the offence under section 3 (1) to a sum of Rs. 2,000. In so far as the other offence was concerned the High Court set aside the sentence of fine and instead directed that the respondent be released on his entering into a bond for a sum of Rs. 2,000 under section 562 of the Code of Criminal Procedure to keep peace and be of good behaviour for a period of three years.

The provisions of section 3 (1) of the Act read thus :

“Any person who keeps or manages, or acts or assists in the keeping or management of, a brothel shall be punishable on first conviction with rigorous imprisonment for a term of not less than one year and not more than three years and also with fine which may extend to two thousand rupees and in the event of a second or subsequent conviction, with rigorous imprisonment for a term of not less than two years and not more than five years and also with fine which may extend to two thousand rupees.”

The High Court took the view that the word “punishable” in the aforesaid section instead of “punished” necessarily postulates a certain discretion on the Court to impose a sentence of imprisonment or a sentence of fine or both. The High Court felt that there was no escape

“from this construction in view of the interpretation put by the Full Bench of that Court as to the meaning to be adopted in view of the use of the word “punishable” in prescribing a punishment.”

The decision relied upon by the High Court is *Emperor v. Peter D'Souza*¹. That was a case under section 43 (1) of the Bombay Abkari Act (V of 1878). The provision which the Full Bench had to construe was substituted for the original provision by Bombay Act (XXIX of 1947). The original provision was that a person “shall, on conviction, be punished for each such offence with imprisonment for a term which may extend to six months, or with fine which may extend to Rs. 1,000 or with both.” The Amending Act, 1947 substituted for this the following provision :

“Shall, on conviction, be punishable for the first offence with imprisonment for a term which may extend to six months and with fine which may extend to Rs. 1,000 :

Provided that in the absence of special reasons to the contrary to be mentioned in the judgment of the Court, such imprisonment shall not be less than three months and fine shall not be less than Rs. 500.”

It was contended before the Court that the object of the amended provision was to make it obligatory upon the Court convicting a person of an offence under that

Act to pass a sentence of imprisonment which shall ordinarily not be less than three months, while it was not obligatory to pass a sentence of imprisonment under the original provision.

It is significant to notice that the expression used in the original provision is "punished" and not "punishable." A bare perusal of the Penal Code would show that the Legislature has in the penal provisions also used the expression "punished". This is so even where discretion has been conferred upon the Court to award a sentence of fine in lieu of or in addition to a sentence of imprisonment. The mere use of the word "punished" or the word "punishable" is not determinative of the intention of the Legislature to empower the Court to select one or more kinds of sentences prescribed by it for an offence or to making it obligatory upon it to pass a particular sentence or sentences so prescribed. One thing follows with certainty from the use of either of these expressions and that is that upon the conviction of a person for the particular offence the Court is bound to award punishment. What the nature and extent of the punishment to be awarded has to be ascertained by a consideration of the entire penal provision. Now, let us consider section 43 (1) as it was before its amendment in the year 1946. There the Legislature had said that the convicted person shall be "punished." Then it proceeded to say that the punishment shall be (a) imprisonment for a term which may extend to six years; (b) or a fine which may extend to Rs. 1,000; (c) or imprisonment as well as fine. If the whole provision is construed it is clear that despite the use of the words "punished with" the nature of the sentence was left to the discretion of the Court. Even if the word "punishable" had been used instead of "punished" the result would have been the same because of the use of the word "or." That is to say that the provision would have been open to only one construction and that is that it was discretionary with the Court to choose the nature of punishment to be awarded to a convicted person. Since all this was clear there would have been no point in amending the provision in the year 1947 if the nature of the punishment was still to be left to the discretion of the Court. The plain meaning of the words

"shall, on conviction, be punishable for the first offence with imprisonment for a term which may extend to six months and with fine which may extend to rupees one thousand"

would be that the Court convicting a person of an offence under the Act was bound to award a sentence consisting both of imprisonment and fine. The words "may extend" preceding "six months" and "rupees one thousand" respectively merely give discretion to the Court in so far as the extent of imprisonment or fine to be awarded is concerned and nothing more. It is obvious that the Legislature replaced the original "or" which gave an option to the Magistrate by "and" to make its intention clear. The Full Bench, however, expressed the view that by using the expression "punishable" the Legislature conferred a discretion on the Court and because of the use of that expression the Full Bench has construed "and" as meaning "and/or". It is no doubt true that the expression "punishable" means "liable to punishment". "Liable to punishment" only means that a person who has contravened a penal provision will have to be punished. That it does not mean anything different from "shall be punished". Punishment is obligatory in either case. But, as already observed, what the nature of punishment is to be must be ascertained by a consideration of the whole of the penal provisions. We, therefore, are, unable to accept the view of the Full Bench that by merely using the expression "punishable" the Legislature intended to say that a discretion was left with the Court to determine the nature of punishment. If the view of the High Court that the word "punishable" imports a discretion in the Court were to be accepted an astonishing result would ensue: it would follow that there is discretion in the Court whether to punish a convicted person at all or not. Mr. Garg frankly says that he cannot support a construction which would lead to such a result. Once the position is reached that the expression "punishable" does not confer a discretion on the Court whether to award a punishment or not, no difficulty arises in construing the section and so the conjunction "and" is not required to be construed to mean the opposite, that is, to mean "or".

Mr. Garg tried to rely upon the proviso in support of his contention that the determination of the nature of the sentence was left in the discretion of the Court. In our opinion, the proviso does not afford any assistance to him. On the other hand it would seem to fetter the discretion of the Court still further by making it obligatory upon the Court to pass, ordinarily, a sentence of imprisonment of not less than three months.

We have discussed the Full Bench decision at length because the High Court has relied upon it, and the word "punishable" occurs in the provision which we have to construe here. In the context in which the word "punishable" has been used in section 3 (1) it is impossible to construe it as giving any discretion to the Court in the matter of determining the nature of sentences to be passed in respect of a contravention of the provision. By using the expression "shall be punishable" the Legislature has made it clear that the offender shall not escape the penal consequences. What the consequences are to be are then specified in the provision and they are rigorous imprisonment for a period not less than one year and not more than three years and also a fine which may extend to Rs. 2,000. These are the punishments with respect to a first offence and higher punishments are prescribed in respect of a subsequent offence. By saying that a person convicted of the offence shall be sentenced to imprisonment of not less than one year the Legislature has made it clear that its command is to award a sentence of imprisonment in every case of conviction. It is difficult to conceive of clearer language for couching such command. We have no doubt that the High Court was in error in construing this section in the manner it has done. The logical result of this would be to pass a sentence of imprisonment upon the respondent for a period not less than one year in respect of the offence under section 3 (1) of the Act. However, when Special Leave was granted this Court made the following order :

"Special Leave granted. It may be recorded that Counsel for the State states that the State will not insist on this accused person's going to jail. It will be open to consideration of the Court hearing the appeal to keep this in mind in deciding the matter....."

Mr. Bindra who appeared for the State did not insist that we should send the respondent to jail—which would be the result if we pass a sentence of imprisonment made obligatory by the law. In the circumstances we leave the matter where it is and merely pronounce our interpretation of the law.

V.K.

Order accordingly.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—A. K. SARKAR, J. R. MUDHOLKAR AND R. S. BACHAWAT, JJ.
Jagat Bahadur .. Appellant*

v.

The State of Madhya Pradesh

.. Respondent.

Criminal Procedure Code (V of 1898), section 423—Appellate Court—Powers of—No power to impose punishment higher than the maximum that could have been imposed by trial Court.

Practice—Finding of High Court based on appreciation of evidence—Interference with by Supreme Court.

An appellate Court is not competent to impose a punishment higher than the maximum that could have been imposed by the trial Court. An appeal Court is after all 'a Court of error', that is, a Court established for correcting an error. If, while purporting to correct an error, the Court were to do something which was beyond the competence of the trying Court, how could it be said to be correcting an error of the trying Court? No case has been cited (in the instant case) in which it has been held that the High Court as an appellate Court, after setting aside an acquittal can pass a sentence beyond the competence of the trying Court. Therefore both on principle and authority it is clear that the power of the appellate Court to pass a sentence must be measured by the power of the Court from whose judgment an appeal has been brought before it.

Sitaram v. Emperor, 7 N. L. R. 109 ; *Emperor v. Abasali Tusufalli*, A.I.R. 1935 Nag. 139 ; *Mehi Singh v. Mangal Khandu*, I.L.R. 39 Cal. 157 ; *Emperor v. Muhammad Yakub Ali*, I.L.R. 45 All. 594 ;

Maung E. Maung v. The King, A.I.R. 1940 Rang. 118; and *In re Tirumal Raju*, (1947) 1 M.L.J. 238; A.I.R. 1947 Mad. 368, approved.

The Supreme Court does not ordinarily interfere with a finding of the High Court based on appreciation of evidence, unless there are strong reasons for doing so. The fact that the High Court has taken a view of the evidence different from that of the trying Magistrate and has set aside the order of acquittal is no ground for discarding the finding of the High Court when it has given good reasons for not accepting the defence evidence and for accepting the prosecution evidence.

Appeal by Special Leave from the Judgment and Order dated the 8th February, 1963, of the Madhya Pradesh High Court in Criminal Appeal No. 121 of 1962.

E. C. Agarwala, Advocate (*P. C. Agarwala*, Advocate on Record not present), for Appellant.

M. N. Shroff, Advocate (*I. N. Shroff*, Advocate on Record not present), for Respondent.

The Judgment of the Court was delivered by.

Mudholkar, J.—The appellant, a Police Constable, was tried for an offence under sections 170, 342 and 392, Indian Penal Code, but was acquitted by the trying Magistrate of all these offences. The High Court to which an appeal was preferred by the State Government set aside the acquittal and convicted the appellant of each of these offences. It sentenced him to rigorous imprisonment for a period of one year in respect of the offence under section 170 and to a period of six months for an offence under section 342. In respect of the offence under section 392 the High Court sentenced him to undergo rigorous imprisonment for a period of four years and further ordered that all the sentences should run concurrently.

Briefly stated the prosecution case was that the appellant who was posted at Rewa took leave for 15 days from 7th August, 1958, with a view to go to his village Hati in District Satna but instead went to Jabalpur wearing the uniform of a police Head Constable. There he met the complainant Ram Kumar, P.W. 1 at the Omti Bridge near the pan shop of one Saligram, P.W. 2. He engaged him in conversation and learnt from him that the latter was from village Beldara, Police Station Maihar. He told Ram Kumar that a theft had been reported from that area and that he had come to Jabalpur to investigate into it and that Ram Kumar answered the particulars of the man wanted in connection with the theft. It may be mentioned that Ram Kumar was wearing a gold "mohar", threaded in a piece of string, round his neck. Questioned about it by the appellant he told him that he had received it as a present from his father-in-law. The appellant took Ram Kumar along with him from place to place and at one place he tried to relieve Ram Kumar of the gold mohar saying that it was a stolen article. Ram Kumar resisted and protested and so also did one Phoolchand who was there. The appellant then got into a rickshaw along with Ram Kumar on the pretext of taking him to the Police Station. Instead of stopping at the Police Station he asked the rickshaw to proceed to Katni road and dismissed the rickshaw puller after paying his fare. He then gave a beating to Ram Kumar and snatched the gold mohar from his neck. While they were standing on the road to Katni a motor truck happened to pass that way. The appellant stopped it and got into it along with Ram Kumar and proceeded towards Katni. After reaching the place the appellant set off Ram Kumar to fetch a cup of tea for him. While Ram Kumar was away the appellant got into a goods train which happened to be leaving Katni railway station in the direction of Satna at that time and travelled in the brake van. Ram Kumar, finding that the appellant had escaped, lodged a report with the Police. Eventually the appellant was apprehended and challenged. He denied the offence and said that he was falsely implicated and also said that it was a case of mistaken identity.

The main question was regarding the appellant's identity. There is voluminous evidence on the point which has been discussed fully by the High Court. On the basis of that evidence the High Court came to the conclusion that the person

who had snatched away the gold mohar from Ram Kumar was no other than the appellant.

Mr. E.C. Agarwala who appears for the appellant tried to urge before us that the High Court was in error in holding that the person who committed the various offences was the appellant. This Court does not ordinarily interfere with a finding of the High Court based on appreciation of evidence, unless there are strong reasons for doing so. Mr. Agarwala could point out no other reason except this that the High Court had taken a view of evidence different from that of the trying Magistrate and set aside the appellant's acquittal and that therefore this Court should appraise the evidence. That of course is no ground for discarding the finding of the High Court. The High Court has given good reasons in its judgment for accepting the prosecution evidence for coming to the conclusion that the identity of the appellant was established. It has also given good reasons for not accepting the defence evidence. In these circumstances we did not permit learned Counsel to take us through the evidence adduced in the case.

The only other question urged by learned Counsel is regarding sentence. He points out that the appellant was tried by a Magistrate of the First Class and that under section 32 of the Code of Criminal Procedure the maximum sentence which such a Magistrate is entitled to pass is imprisonment for a term not exceeding two years and a fine not exceeding Rs. 2,000. There is nothing to show that the learned Magistrate was invested with powers under section 30 of the Code by virtue of which he could, under section 34, pass a sentence of imprisonment upto the limit of seven years. If the learned Magistrate, instead of acquitting the appellant, had convicted him, he could, therefore, not have passed a sentence of imprisonment in respect of the offence under section 392 for a term exceeding two years and that, therefore, the High Court was incompetent to pass the sentence of imprisonment of four years?

Mr. Shroff, however, contended that even though that was so the High Court having held the appellant guilty of the offence under section 392 is as competent to pass any sentence in respect of that offence as is permissible under the Indian Penal Code. In support of the contention he relied on clause (a) of section 423 (1) of the Code of Criminal Procedure. Under this clause, after setting aside the acquittal of a person, the appellate Court can "pass sentence on him according to law." It is true that section 31 (1) also empowers the High Court to pass any sentence authorised by law. But the question is whether these provisions enable the High Court to pass a sentence which the Court from whose decision an appeal has been preferred before it was not authorised to pass.

There are several cases of the High Courts in which this question has been considered. One of them is *Sitaram v. Emperor*¹, where the question has been elaborately discussed. Stanyon, A.J.C. who decided the case has said thus :

"The Magistrate who tried the case had power under section 32 of the Code of Criminal Procedure, to pass a sentence of imprisonment for a term not exceeding six months, and fine not exceeding two hundred rupees. By section 423 of the same Code, the District Magistrate, sitting as an Appellate Court on an appeal from the conviction of the applicants, was empowered, on maintaining the conviction of each applicant, to alter the nature of the sentence, subject only to the proviso that he did not enhance the same. The alteration of a sentence of imprisonment for four months, into a sentence of fine in the sum of Rs. 300, or in default imprisonment for four months, was clearly no enhancement, but a reduction in severity of the sentence. Section 402 of the Code follows human sentiment and common sense in regarding the substitution of fine for imprisonment as a merciful commutation of punishment. Therefore, the sentences ordered by the District Magistrate were all within the letter of the rule set out in section 423 aforesaid. Section 32 contains no word which makes it applicable to any Court of Appeal or Revision : nor is there any restricting proviso to be found in section 423 or any other section dealing with appellate jurisdiction, such as we read in section 439, sub-section (3). Nevertheless, it is a rule underlying the whole fabric of appellate jurisdiction that the power of an Appellate Court is measured by the power of the Court from whose judgment or order the appeal before it has been made. It is a fundamental principle that every Court of Appeal exists for the purpose, where necessary, of doing, or causing to be done, that which each Court subordinate to its appellate jurisdiction should have, but has not, done, or caused to be done, and nothing further. Therefore, the jurisdiction in appeal is necessarily limited in each case to the same ex-

tent as the jurisdiction from which that particular case comes. It is a proposition which cannot be disputed that all powers conferred upon an Appellate Court, as such, must be interpreted as subject to the general rule above stated. In a case reported at 2 Weir 487, the Madras High Court held that an Appellate Court cannot pass, on appeal, a sentence which the original Magistrate was not competent by law to pass. Section 106, sub-section (3) of the Criminal Procedure Code, 1888, appears to give an Appellate Court power to make an order under that section in any appeal in which an accused may have been convicted of rioting, assault, or other offence referred to therein. If such a person were acquitted by a District Magistrate, but convicted on appeal by the High Court, there can be no doubt that the Appellate Court, as such, could make an order under this sub-section. Its power to make the order would not be confined to cases where conviction had taken place before the Magistrate. But it has been held—and, in my opinion, rightly held—that the Appellate Court, as such, is not competent to make an order under section 106 if the Magistrate, from whose decision the appeal has come before it, could not have made it. This dictum was laid down in *Mahmudi Sheikh v. Aji Sheikh*¹, *Muthiah v. Emperor*², and *Paramasiva Pillai v. Emperor*³. In the second of the above cases the learned Judges remarked,—‘We think that the power given to an Appellate Court to make an order under this section is not an unlimited power to make such an order in any circumstances, but is to be taken as giving the Appellate Court power to do only that which the lower Court could and should have done.’

I do not see why any other rule of construction should be applied to the power given by section 423 to alter the nature of a sentence.”

We have seen the three decisions to which the learned Judge has made reference and they undoubtedly support his conclusion. This decision was followed in *Emperor v. Abasali Yusufalli*⁴, and also in *Mehi Singh v. Mangal Khandu*⁵; *Emperor v. Muhammad Yakub Ali*⁶; and *Maung E. Maung v. The King*⁷. In *In re, Tirumal Raju*⁸, it has been held that an appellate Court is not competent to impose a punishment higher than the maximum that could have been imposed by the trial Court. It seems to us that these cases lay down the correct law. An appeal Court is after all ‘a Court of error’, that is, a Court established for correcting an error. If, while purporting to correct an error, the Court were to do something which was beyond the competence of the trying Court, how could it be said to be correcting an error of the trying Court? No case has been cited before us in which it has been held that the High Court, after setting aside an acquittal, can pass a sentence beyond the competence of the trying Court. Therefore, both on principle and authority it is clear that the power of the appellate Court to pass a sentence must be measured by the power of the Court from whose judgment an appeal has been brought before it. The High Court was thus in error in sentencing the appellant to undergo imprisonment in respect of the offence under section 392 for a period exceeding two years. Accordingly we allow the appeal partially and reduce the sentence of imprisonment in respect of the offence under section 392 from rigorous imprisonment of four years to a period of two years. Subject to this modification we dismiss the appeal.

V.K.

Appeal allowed in part.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*; K. N. WANCHOO, M. HIDAYATULLAH, V. RAMASWAMI AND P. SATYANARAYANA RAJU, JJ.

The State of Punjab and another

.. *Appellants**

v.

Hari Kishan Sharma

.. *Respondent.*

Punjab Cinemas (Regulation) Act (XI of 1952), section 5 (2) corresponding to Cinema Regulations Act (Central) (XXXVII of 1952), Section 12 Scope—Power to issue licences—Subject to control of the Government—If entitled Government to direct licensing authority to send all applications for licences to itself and consider them direct.

In the context in which the control of the Government has been provided for by section 5 (2) of the Punjab Cinemas (Regulation) Act it would be permissible to hold that the said control can be

1. (1894) I.L.R. 21 Cal. 622.

2. (1906) I.L.R. 29 Mad. 190.

3. (1907) I.L.R. 30 Mad. 48.

4. A.I.R. 1935 Nag. 139.

5. I.L.R. (1912) 39 Cal. 157.

6. I.L.R. (1923) 45 All. 594.

7. A.I.R. 1940 Rang. 118.

8. (1947) 1 M.L.J. 238 : A.I.R. 1947 Mad. 368.

* C.A. No. 763 of 1963.

exercised generally before applications for licences are granted, or particularly by correcting individual orders if they are found to be erroneous, but in any case, Government has to function either as an appellate authority or as a revisional authority, for that is the result of section 5 (2) and (3). Government cannot assume for itself the powers of the licensing authority which have been specifically provided for by section 5 (1) and (2) of the Act. To hold that the control of the Government contemplated by section 5 (2) would justify their taking away the entire jurisdiction and authority from the licensing authority, is to permit the Government by means of its executive power to change the statutory provision in a substantial manner; and that position clearly is not sustainable. The Government cannot direct the licensing authority to send the applications for licences to itself and consider them.

Section 5 clearly requires that such applications must be dealt with by the licensing authorities in their respective areas in the first instance, and if they are granted, they may be revised by Government under section 5 (2); and if they are rejected, parties aggrieved by the said orders of rejection may prefer appeals under section 5 (3) of the Act. The basic fact in the scheme of the Act is that it is the licensing authority which is solely given the power to deal with such applications in the first instance, and this basic position cannot be changed by Government by issuing any executive orders, or by making Rules under section 9 of the Act.

Karnati Rangaiah v. A. Sultan Mohideen & Brothers, Tedipatri, (1956) An.W.R. 112; I.L.R. (1956) A.P. 413; A.I.R. 1957 A.P. 513, *Vishnu Talkies v. State and others*, I.L.R. 12 Pat. 44, and *Bharat Bhushan Cinema v. City Magistrate*, A.I.R. 1956 All. 99, overruled.

Appeal by Special Leave from the Judgment and Order dated the 30th March, 1961, of the Punjab High Court in Civil Writ No. 1100 of 1959.

Bishan Narain, Senior Advocate (*R. N. Sachithy*, Advocate, with him), for Appellants.

S. N. Andley, Advocate of *M/s. Rajinder Narain & Co.*, for Respondent.

The Judgment of the Court was delivered by

Gajendragadkar, C.J.—The short question of law which arises in this appeal relates to the construction of section 5 (2) of the Punjab Cinemas (Regulation) Act, 1952 (XI of 1952) (hereinafter called 'the Act'). The respondent, Hari Kishan Sharma, who claims to be the owner of a certain site in the town of Jhajjar, desired to construct a cinema hall at the said place for the purpose of exhibiting cinematographs. On 16th December, 1956, he submitted an application to appellant No. 2, the Sub-Divisional Officer, Jhajjar, for the grant of the licence to construct and run a permanent cinema hall on his site. On 22nd February, 1957, appellant No. 2 forwarded the said application to the Tehsildar for inspection of the site. It appears that on 24th April, 1957, the Government of appellant No. 1, the State of Punjab, had issued instructions in regard to the grant of licences under the relevant provisions of the Act. These instructions required that all requests for the grant of permission for opening all new permanent cinemas should be referred to appellant No. 1 for orders. On 26th September, 1957, the Tehsildar made a report that the site was in accordance with the provisions of the Act and that the respondent was its owner. On 30th September, 1957, another memorandum was issued by appellant No. 1 addressed to all the District Magistrates and the Sub-Divisional Officers conveying the decision of appellant No. 1 that when an application for grant of permission to construct a permanent cinema was referred to the Government, it should be accompanied by the particulars enumerated in the memorandum. Amongst the items thus enumerated were the population of the town where the permanent cinema is proposed to be constructed; whether there are any permanent cinemas already in existence in the town, and if so, how many; whether the applicant/applicants has/have been taking any part in any activity undermining the security of the State; and whether the financial position of the applicant/applicants is sound. These notifications were issued by appellant No. 1 while the application made by the respondent was pending consideration.

On 24th April, 1958, appellant No. 2 informed the respondent that the site proposed by him for the construction of the cinema hall had been approved. The respondent was required to submit a plan of the building within a month and he was warned not to transfer the ownership of the site without the previous sanction of

the licensing authority. On 23rd May, 1958, the respondent submitted the building plans. These plans were forwarded by appellant No. 2 to the Executive Engineer, Provincial Division, Rehtak, for scrutiny. While forwarding the plans to the Executive Engineer, appellant No. 2 had stated that the respondent had been allowed to construct a permanent cinema hall at Jhajjar and the site plans were being submitted for proper scrutiny and approval at an early date.

Meanwhile, it appears that one Mohan Lal had also applied for grant of a licence for construction of a cinema hall in June, 1958, but he was informed that a permission had already been granted to one person, and there was no scope for a second cinema hall. That is why he was told that his application could not be considered. Yet, another person, Sultan Singh by name, made a similar application on 26th August, 1958. On 7th October, 1958, the Provincial Town Planner, Punjab, wrote to the Executive Engineer, that the building plans submitted by the respondent had been checked and they appeared to satisfy the Rules framed under the Act so far as the structural features of the building were concerned. On 6th October, 1958, however, appellant No. 2 addressed a memorandum to the respondent informing him that the site plans prepared by him for the construction of a permanent cinema hall would be referred to appellant No. 1 for approval "according to the latest instructions".

Then followed a report made by appellant No. 2 to appellant No. 1 on 31st October, 1958, mentioning all the relevant facts in regard to the application of the respondent, and adding that the report was forwarded to appellant No. 1 for its consideration. On 20th December, 1958, appellant No. 2 submitted another report to appellant No. 1 saying *inter alia*, that it had been reported by the police that the respondent had been arrested in connection with "Save Hindi Agitation" and was discharged on tendering apology and that he did not pay any income-tax. On 4th March, 1959, appellant No. 2 informed the respondent that his application had been rejected by appellant No. 1 as the same did not fulfil the conditions laid down in the memorandum dated 30th September, 1957. It appears that appellant No. 1 had decided to grant the licence to Sultan Singh, and that probably is the reason why the application of the respondent was rejected.

On receiving this communication from appellant No. 2 the respondent preferred an appeal to appellant No. 1 under section 5 (3) of the Act, but his appeal was rejected on 14th April, 1959; and that drove the respondent to the High Court of Punjab to seek for an appropriate relief under its jurisdiction under Article 226 of the Constitution.

In his petition, the respondent alleged that the order passed by appellant No. 1 rejecting his application for a licence under section 5 was illegal, arbitrary, capricious, oppressive, and without jurisdiction. In support of his plea, the respondent had also alleged that in rejecting his application, appellant No. 1 had been influenced by extraneous considerations which had no relevance to the decision of the question as to whether a licence should be granted to him or not. The suggestion made by the respondent was that appellant No. 1 wanted to prefer Sultan Singh to him for extraneous considerations, and that rendered the impugned order invalid. On these allegations, the respondent claimed that a writ in the nature of *certiorari* be issued setting aside the said order, and directing the appropriate authority under section 5 of the Act to deal with the respondent's application in accordance with law.

The appellants disputed the allegations made by the respondent in his writ petition. It was urged that appellant No. 1 had taken into account the relevant considerations prescribed by the instructions issued by it by virtue of its authority under section 5 (2) of the Act, and had come to the conclusion that the respondent's application could not be granted. The plea made by the respondent that appellant No. 1 had been influenced by extraneous considerations, was denied.

On these pleas, the High Court was called upon to consider five issues. The important ones amongst these issues were about the jurisdiction of appellant No. 1

to pass the order rejecting the respondent's application for a licence, and about the invalidity of the order resulting from the fact that it was based on extraneous considerations. The High Court has upheld the respondent's contention on the first point, and has held that appellant No. 1 had no jurisdiction to deal with the matter as it has purported to do. On that view, the High Court did not think it necessary to consider the other issues, particularly because "they involved questions of fact which are more or less disputed and on which it will not be possible to come to any clear conclusion on the factual side". In the result, the High Court has allowed the writ petition filed by the respondent and has directed the appellants to treat the order made by appellant No. 1 as void, ineffective, invalid and of no binding effect. In consequence, a writ of *mandamus* has also been issued requiring the licensing authority to deal with the respondent's application in accordance with law. It is against this order that the appellants have come to this Court by Special Leave and the only question which they have raised before us for our decision is whether the High Court was right in holding that appellant No. 1 had no jurisdiction to deal with the respondent's application in the manner it has done under section 5 (2) of the Act. That is how the question about the construction of section 5 (2) falls to be decided in the present appeal.

Before dealing with this question, we may very briefly indicate the effect of the broad provisions of the Act. The Act was passed in 1952 in order to make provision for regulating exhibitions by means of cinematographs in Punjab. Section 3 of the Act provides that no person shall give an exhibition, by means of a cinematograph, elsewhere than in a place licensed under this Act or otherwise than in compliance with any condition and restriction imposed by such licence. Section 4 provides that the licensing authority under the Act shall be the District Magistrate. The proviso to this section authorises the Government, by notification, to constitute for the whole or any part of the State, such other authority as it may specify therein to be the licensing authority for the purposes of the Act. It is common ground that appellant No. 2 has been constituted a licensing authority for the area with which we are concerned in the present appeal.

That takes us to section 5 which must be read :—

"5. (1) The licensing authority shall not grant a licence under this Act unless it is satisfied that—

(a) the rules made under this Act have been complied with ; and

(b) adequate precautions have been taken in the place, in respect of which the licence is to be given, to provide for the safety of the persons attending exhibitions therein.

(2) Subject to the foregoing provisions of this section and to the control of the Government the licensing authority may grant licences under this Act to such persons as it thinks fit, on such terms and conditions as it may determine.

(3) Any person aggrieved by the decision of the licensing authority refusing to grant a licence under this Act may, within such time as may be prescribed, appeal to the Government or to such officer as the Government may specify in this behalf and the Government or the officer, as the case may be, may make such order in the case as it or he thinks fit."

Sub-section (4) of section 5 authorises the Government to issue directions to licensees generally or to any licensee in particular for the purpose specified by it. Section 6 confers powers on Government or local authority to suspend exhibitions of films in certain cases ; and section 7 prescribes penalties. Section 8 empowers the State Government or the licensing authority to suspend, cancel or revoke a licence granted under section 5, on one or more of the grounds indicated by clauses (a) to (g) of sub-section (1). The other sub-sections of section 8 prescribe the procedure which has to be followed in exercising the powers conferred by sub-section (1). Section 9 confers on the Government the power to make Rules by a notification; this power can be exercised for any of the purposes mentioned in clauses (a), (b) and (c) of the said section. Section 10 gives power to the State Government to exempt any cinematograph exhibition or class of cinematograph exhibitions from the operation of any of the provisions of the Act ; and section 11 provides that the Cinematograph Act, 1918 (II of 1918) in so far as it relates to matters other than the sanctioning of cinematograph films for exhibition, is hereby repealed. There is a proviso to

this section with which we are not concerned in the present appeal. That, broadly stated, is the scheme of the Act.

There are two Central Acts dealing with the same subject. The first one is Act II of 1918 which, as we have seen, is repealed in the manner prescribed by section 11 of the Act so far as Punjab is concerned. Section 5 of this Act corresponds generally to section 5 of the Act. The Central Act II of 1918 has been subsequently repealed by Central Act XXXVII of 1952. Section 12 of this latter Act corresponds generally to section 5 of the Act.

The question which we have to decide in the present appeal lies within a very narrow compass. What appellant No. 1 has done is to require the licensing authority to forward to it all applications received for grant of licences, and it has assumed power and authority to deal with the said applications on the merits for itself in the first instance. Is appellant No. 1 justified in assuming jurisdiction which has been conferred on the licensing authority by section 5 (1) and (2) of the Act? It is plain that section 5 (1) and (2) have conferred jurisdiction on the licensing authority to deal with applications for licences, and either grant them or reject them. In other words, the scheme of the statute is that when an application for licence is made, it has to be considered by the licensing authority and dealt with under section 5 (1) and (2) of the Act. Section 5 (3) provides for an appeal to appellant No. 1 where the licensing authority has refused to grant a licence; and this provision clearly shows that appellant No. 1 is constituted into an appellate authority in cases where an application for licence is rejected by the licensing authority. The course adopted by appellant No. 1 in requiring all applications for licences to be forwarded to it for disposal, has really converted the appellate authority into the original authority itself, because section 5 (3) clearly allows an appeal to be preferred by a person who is aggrieved by the rejection of his application for a licence by the licensing authority.

It is, however, urged by Mr. Bishen Narain for the appellants that section 5 (2) confers very wide powers of control on appellant No. 1 and this power can take within its sweep the direction issued by appellant No. 1 that all applications for licences should be forwarded to it for disposal. It is true that section 5 (2) provides that the licensing authority may grant licences subject to the provisions of section 5 (1) and subject to the control of the Government; and it may be conceded that the control of the Government subject to which the licensing authority has to function while exercising its power under section 5 (1) and (2), is very wide; but however wide this control may be, it cannot justify appellant No. 1 to completely oust the licensing authority and itself usurp his functions. The Legislature contemplated a licensing authority as distinct from the Government. It no doubt recognises that the licensing authority has to act under the control of the Government; but it is the licensing authority which has to act and not the Government itself. The result of the instructions issued by appellant No. 1 is to change the statutory provision of section 5 (2) and obliterate the licensing authority from the Statute Book altogether. That, in our opinion, is not justified by the provision as to the control of Government prescribed by section 5 (2).

The control of Government contemplated by section 5 (2) may justify the issue of general instructions or directions which may be legitimate for the purpose of the Act, and these instructions and directions may necessarily guide the licensing authority in dealing with applications for licences. The said control may, therefore, take the form of the issuance of general directions and instructions which are legitimate and reasonable for the purpose of the Act. The said control may also involve the exercise of revisional power after an order has been passed by the licensing authority. It is true that section 5 (2), in terms does not refer to the revisional power of the Government; but having regard to the scheme of the section, it may not be unreasonable to hold that if the Government is satisfied that in a given case a licence has been granted unreasonably, or contrary to the provisions of section 5 (1) or contrary to the general instructions legitimately issued by it, it may *suo moto* exercise its power to correct the said order by exercising its power of control. In other words, in the context in which the control of the Government has been

provided for by section 5 (2), it would be permissible to hold that the said control can be exercised generally before applications for licences are granted, or particularly by correcting individual orders if they are found to be erroneous, but in any case, Government has to function either as an appellate authority or as a revisional authority, for that is the result of section 5 (2) and (3). Government cannot assume for itself the powers of the licensing authority which have been specifically provided for by section 5 (1) and (2) of the Act. To hold that the control of the Government contemplated by section 5 (2) would justify their taking away the entire jurisdiction and authority from the licensing authority, is to permit the Government by means of its executive power to change the statutory provision in a substantial manner; and that position clearly is not sustainable.

Section 5 (3) provides for an appeal at the instance of the party which is aggrieved by the rejection of its application for the grant of a licence. No appeal is provided for against an order granting the licence; but as we have just indicated, in a case it appears to the Government that an application has been granted erroneously or unfairly, it can exercise its power of control specified by section 5 (2) and set aside such an erroneous order, and that would make the provision as to appeal or revision self-contained and satisfactory.

The scheme of the Act clearly indicates that there are two authorities which are expected to function under the Act—the licensing authority, as well as the Government. Section 8 is an illustration in point. It empowers the State Government or the licensing authority to suspend, cancel or revoke a licence on the grounds specified by it; and that shows that if a licence is granted by the licensing authority, it has the power to suspend, cancel or revoke such a licence just as Government has a similar power to take action in respect of the licence already granted. We are, therefore, satisfied that the High Court was right in coming to the conclusion that appellant No. 1 had no authority or power to require all applications for licences made under the provisions of the Act to be forwarded to it, and to deal with them itself in the first instance. Section 5 clearly requires that such applications must be dealt with by the licensing authorities in their respective areas in the first instance, and if they are granted, they may be revised by Government under section 5 (2); and if they are rejected, parties aggrieved by the said orders of rejection may prefer appeals under section 5 (3) of the Act. The basic fact in the scheme of the Act is that it is the licensing authority which is solely given the power to deal with such applications in the first instance, and this basic position cannot be changed by Government by issuing any executive orders, or by making Rules under section 9 of the Act.

It appears that this question has been considered by the Andhra Pradesh, and the Rajasthan High Courts and they have taken the view that the Government can, by virtue of the power of control, deal with the applications for licences themselves in the first instance [vide *Karnati Rangaiah v. A. Sultan Mohiddin & Brothers, Tadipatri and others*¹, and *M/s. Vishnu Talkies v. The State and others*², respectively]. We are satisfied that this view does not correctly represent the true legal position under the relevant provisions of the Acts prevailing in the two respective States. In *Bharat Bhushan Cinema v. City Magistrate and another*³ also, the powers of the State Government under section 5 (3) of the Cinematograph Act, 1918, have been similarly construed and that again, in our opinion, cannot be said to be right. In dealing with the question about the scope and effect of the power of control conferred on the State Government, the Allahabad High Court has taken the view that the power of control which has been conferred on the State Government by section 5 (2) is wide enough to enable the State Government to revise an order passed by a licensing authority granting a licence. This observation, in our opinion, correctly represents the true scope and effect of the power of control conferred on the State Government.

The result is, the appeal fails and is dismissed with costs.

K.S.

Appeal dismissed.

1. (1956) An.W.R. 1112 : I.L.R. (1956) A.P. 413 : A.I.R. 1957 A.P. 513.

2. (1962) I.L.R. 12 Raj. 44.
3. A.I.R. 1956 All. 99.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYATULLAH, J. C. SHAH AND S. M. SIKRI, JJ.

Nalini Dassi *alias* Nabanalini Dassi

.. *Appellant**

v.

Kshitish Chandra Hajra and others

.. *Respondents.*

Bengal Agricultural Debtors Act (VII of 1936), section 37-A introduced by Act XI of 1942—Agricultural debtor—Mortgage action—Sale of property—Purchase by decree-holder—Provision for delivery back of the property to agricultural debtor—Applies in the case of a bona fide purchaser from auction-purchaser also—Amount of debt—Jurisdiction of the Board under the Act. Jurisdiction—Question to be raised at the earliest stage.

Under the provisions of section 37-A of the Bengal Agricultural Debtors Act, once the sale is set aside, the auction-purchaser, whether he be the decree-holder or somebody else including a *bona fide* purchaser, cannot remain in possession, for the right of the person who had purchased the property to remain in possession would only exist so long as the sale subsists.

If the intention had been that *bona fide* purchaser for value other than the decree-holder-auction-purchaser would be out of the purview of section 37-A of the Act, specific provision would have been made.

Section 37-A (1) (c) affords protection in the case of *bona fide* purchasers only where the sale took place before 20th December, 1939.

The question of the pecuniary jurisdiction of the Board functioning under the Act to entertain applications under section 37-A of the Act should be raised at the earliest stage. The Board has jurisdiction in case of debts up to Rs. 5,000 but with the sanction of the Collector in writing would have jurisdiction up to Rs. 25,000. If the question of jurisdiction had been raised at the earliest stage, the other side could have shown that the sanction of the Collector was so obtained. The question will not be allowed to be raised in the subsequent stages.

Appeal by Special Leave from the Judgment and Decree dated the 22nd December, 1959, of the Calcutta High Court in Appeal from Appellate Decree No. 1039 of 1954.

Niren De, Additional Solicitor-General of India (*B. P. Singh* and *P. K. Chakravarti*, Advocates, with him), for Appellant.

D. N. Mukherjee, Advocate, for Respondents Nos. 1 to 4.

Sukumar Ghose, Advocate, for Respondent No. 10.

The Judgment of the Court was delivered by

Wanchoo, J.—This appeal by Special Leave raises a question as to the interpretation of section 37-A of the Bengal Agricultural Debtors Act, VII of 1936 (hereinafter referred to as the Act). The respondents brought a suit in the Court of the Second Munsif, Burdwan, for a declaration that they were entitled to the property in dispute, for confirmation of their possession thereof and for a permanent injunction restraining the appellant from interfering with their possession. In the alternative they prayed for delivery of possession to them of the property in dispute in case it was found that they were not in possession. The case of the respondents was that the property in dispute belonged to one Jatindra Mohan Hajra, who was the father of three of the respondents. He mortgaged the property to Kali Krishna Chandra who was defendant in the suit. Kali Krishna Chandra obtained a mortgage decree in the Court of the Subordinate Judge, Burdwan, and in execution of the said decree got the mortgaged property sold, purchased the property in auction sale and thus came into possession thereof in November, 1937. This happened before section 37-A was introduced in the Act by the Bengal Agricul

ral Debtors (Amendment) Act, 1942 (XI of 1942). After the introduction of section 37-A in the Act, the respondents applied thereunder for getting back possession of the property. In the meantime it appears that Kali Krishna Chandra had the property to the present appellant in June, 1942. That is how she was made a party to the proceedings under section 37-A of the Act. The respondents succeeded in their application under section 37-A of the Act and obtained possession of the property in suit in November, 1947. The respondents' case further was that their possession was disturbed by the appellant thereafter and they had to go to the criminal Court in that connection. But the criminal case resulted in acquittal and consequently the respondents brought the present suit in order to remove the cloud on their title and to obtain possession in case it was found that they were not in possession.

The suit was resisted by the appellant on a number of grounds. In the present appeal, however, learned Counsel for the appellant has raised only two grounds before us, namely—(i) that the Debt Settlement Board (hereinafter referred to as the Board) had no jurisdiction in the matter as the decree in the mortgage suit was for more than Rs. 5,000, and (ii) that section 37-A of the Act did not apply to a *bona fide* purchaser for value from the auction-purchaser. We shall confine ourselves therefore to these two points only.

The Munsif who tried the suit held that section 37-A was available against a *bona fide* transferee for value also. But the question of jurisdiction of the Board on the ground that the amount involved was more than Rs. 5,000 was not raised before the Munsif and so there is no finding on that aspect of the matter in the Munsif's judgment. Holding that section 37-A applied to *bona fide* transferees for value also, the Munsif decreed the suit.

Then there was an appeal by the appellant which was decided by the Subordinate Judge. It was in that appeal that it was urged for the first time that the Board had no jurisdiction inasmuch as the amount involved was over Rs. 5,000. That objection was however overruled by the Subordinate Judge on the ground that the amount involved was only Rs. 4,044-8-0. But the Subordinate Judge seems to have held that a *bona fide* transferee for value cannot be affected by the provisions of section 37-A. He therefore allowed the appeal and dismissed the suit.

Then followed an appeal to the High Court. The High Court considered the two questions, which we have set out above. On the question of jurisdiction the High Court held that the amount of debt involved was only Rs. 4,044-8-0 and therefore the Board had jurisdiction. On the question whether *bona fide* transferees for value were bound, the High Court reversed the view taken by the Subordinate Judge and held that such transferees were also covered by section 37-A. It therefore allowed the appeal and restored the decree of the Munsif but ordered parties to bear their own costs throughout. In the present appeal by Special Leave, the appellant raises the same two points before us.

We shall first consider the question of the jurisdiction of the Board. It is urged in this connection that the very application made by the respondents under section 37-A shows that the amount of decretal dues was Rs. 5,841 and therefore the Board had no jurisdiction. We are of opinion that this point as to jurisdiction could have been raised at the earliest possible stage in the Munsif's Court and as it was not so raised it should not have been permitted to be raised for the first time in the Subordinate Judge's Court in appeal. Rule 144, framed under the Act, which relates to jurisdiction of the Board, provides that the maximum amount of the sum total of all debts due from a debtor which can be dealt with under the provisions of the Act shall be Rs. 5,000. There is however a proviso to this rule to the effect that with the previous sanction in writing of the Collector, a Board may deal with an application if the sum total of all debts due from the debtors exceeds Rs. 5,000 but does not exceed Rs. 25,000. It is unnecessary for us to decide in the present appeal whether the High Court was right in holding that the debt due was

only Rs. 4,044-8-0 and not Rs. 5,841, which was shown to be the amount of decretal dues in the application under section 37-A. It is enough to point out that if this point had been raised in the trial Court, the respondents would have been able to show that even if the debt was over Rs. 5,000 permission of the Collector as required by the proviso had been taken by the Board before it dealt with the matter. It is not as if the Board has no jurisdiction above Rs. 5,000 at all. Ordinarily the Board has jurisdiction up to Rs. 5,000 but with the sanction of the Collector in writing its jurisdiction can go up to Rs. 25,000. Therefore if any party wishes to urge that, the Board had no jurisdiction because the amount of the debt was over Rs. 5,000, it must urge it in the trial Court in order to give an opportunity to the other party to show that even if the amount due was over Rs. 5,000 the sanction of the Collector had been obtained by the Board. As the point was not taken in the trial Court in this case, we are not prepared to go into the question whether the total debt due in the present case was over Rs. 5,000 or not, for the respondents had no opportunity of showing that even if the debt was over Rs. 5,000 the sanction of the Collector had been obtained. We therefore reject the contention as to jurisdiction on the ground that the point was not taken in the trial Court.

This brings us to the principal argument urged in this case that section 37-A does not apply to *bona fide* transferees for value. Now the Act was an ameliorative measure for the relief of indebtedness of agricultural debtors and the Preamble of the Act shows, that it was passed because it was expedient to provide for the relief of indebtedness of agricultural debtors. For that purpose it established Boards and also provided for reduction of the amount due under certain circumstances by sections 18 and 22 thereof. It also made other provisions with respect to recovery of amounts due within a period of 15 to 20 years under sections 19 and 22 by instalments and made consequential provisions where the instalment was not paid. Section 37-A was introduced in the Act in 1942 and provided for certain reliefs to an agricultural debtor where any immovable property of such person had been sold after 12th August, 1935, in execution of a decree of a civil Court or a certificate under the Bengal Public Demands Recovery Act, 1913, under certain conditions. It allowed the debtor to apply for relief thereunder to the Board within one year of the coming into force thereof. On receipt of such application, the Board had first to decide whether the application was maintainable and had fulfilled the conditions subject to which such an application could be made. Thereafter the Board had to proceed in accordance with sub-sections (4) to (7) and make an award under sub-section (5). After the award had been made under sub-section (5), we come to section 37-A (8) which may be read *in extenso*:

"The debtor may present a copy of the award made under sub-section (5) to the Civil Court or Certificate-Officer at whose order the property was sold, and such Court or Certificate-Officer shall thereupon direct that the sale be set aside, that the debtor together with any person who was in possession of the property sold or any part thereof at the time of delivery of possession of such property to the decree-holder as an under-*raiyat* of the debtor and who has been ejected therefrom by reason of such sale be restored to possession of the property with effect from the first day of *Raisakh* next following or the first day of *Kartik* next following, whichever is earlier, and that any person who is in possession of the property other than a person who was in possession of the property or part thereof as an under-*raiyat* of the debtor at the time of delivery of possession of such property to the decree-holder shall be ejected therefrom with effect from that date."

Decree-holder is defined in section 37-A (12) as under :—

"In this section the expression 'decree-holder' includes the certificate-holder and any person to whom any interest in the decree or certificate is transferred by assignment in writing or by operation of law."

The contention on behalf of the appellant is that sub-section (4) of section 37-A speaks only of the applicant before the Board, the decree-holder and the landlord of the applicant in respect of the property sold in the case where the decree-holder is not such landlord and therefore a *bona fide* transferee for value from the auction-purchaser cannot be ejected under section 37-A (8) and it is only the decree-holder who can be ejected thereunder if he is still in possession of the property. Now if we read the words of section 37-A (8), that provision clearly lays down that any person who is in possession of the property (except an under-*raiyat* under certain

conditions) shall be ejected therefrom with effect from that date. The words "any person" used in section 37-A (8) are of very wide import and would include even a *bona fide* transferee for value of the property sold. If the argument for the appellant were to be accepted, the benefit of section 37-A (8) would only be given in a case where the property sold in execution is purchased by the decree-holder himself and he remains in possession up to the time the agricultural debtor asks for relief under section 37-A (8). We do not think that the Legislature could have intended that the relief under section 37-A (8) should be given only in this limited class of cases. In any case if that was the intention, the Legislature would not have used the words which we have mentioned above and which clearly imply that any person in possession is liable to be ejected under section 37-A (8). This would also seem to follow from another part of section 37-A (8) which imperatively enjoins on the civil Court or the Certificate-Officer to set aside the sale. It follows from this that where a sale is set aside, whoever may have purchased the property in the sale—whether the decree-holder himself or somebody else—will have to give up possession, for the right of the person who had purchased the property to remain in possession would only exist so long as the sale subsists. Once the sale is set aside, the auction-purchaser—whether he be the decree-holder or somebody else—cannot remain in possession; and this is enforced by the latter parts of section 37-A (8) which lays down that any person in possession would be ejected (except an under-*raiyat* under certain conditions). Further on the same reasoning if the auction-purchaser—whether he be the decree-holder or somebody else—has parted with the property subsequently, that person would be equally liable to ejection, for his right to remain in possession only flows from the sale which is ordered to be set aside under the first part of section 37-A (8). If the intention had been that a *bona fide* purchaser for value other than the decree-holder-auction-purchaser would be out of the purview of section 37-A (8), we should have found a specific provision to that effect in that sub-section by the addition of a proviso or in some other suitable manner. Further it may be pointed out that the word "decree-holder" in sub-section (12) has been given an inclusive definition and it cannot therefore be said that when the word "decree-holder" is used in section 37-A (8), it is confined only to the decree-holder-auction-purchaser. There is no doubt that section 37-A (8) is somewhat clumsily drafted but there is equally no doubt that it intends that the sale should be set aside whoever may be the auction-purchaser and it also intends that after setting aside the sale the property should be delivered back to the debtor whoever may be in possession thereof at the time of this delivery back (except in the case of an under-*raiyat* under certain conditions).

We may in this connection refer to sub-section (1) (c) of section 37-A, which would show what the intention of the Legislature was in spite of the clumsy drafting of section 37-A (8). Clause (c) lays down one of the conditions which has to be satisfied before an application under section 37-A (1) can be made. It reads thus:—

"(c) if the property sold was in the possession of the decree-holder on or after the twentieth day of December, 1939 or was alienated by the decree-holder before that date in any manner otherwise than by—

- (i) a *bona fide* gift by a *heba* whether by registered instrument or not, or
- (ii) any other *bona fide* gift by registered instrument, or
- (iii) a *bona fide* lease for valuable consideration whether by registered instrument, or not; or
- (iv) any other *bona fide* transfer for valuable consideration (excepting a mortgage) by registered instrument."

This provision would suggest that an application under section 37-A (1) can be made if the property was in possession of the decree-holder on or after 20th December, 1939. In this case that condition was fulfilled and therefore the application under section 37-A (1) would lie. Further the latter part of clause (c) shows that only certain alienations by the decree-holder were excepted for the purpose of deciding whether an application under section 37-A (1) could be made. These exceptions require firstly that the alienation by the decree-holder should have been

made before 20th December, 1939. Further even so far as alienations before 20th December, 1939, were concerned, exceptions were only of the four kinds mentioned above. These include *bona fide* transfers for valuable consideration (excepting a mortgage) before 20th December, 1939. So an application could be made even where there was an alienation by the decree-holder of any kind so long as the alienation was after 20th December, 1939. Thus the only exceptions to which section 37-A would not apply would be alienations by the decree-holder before 20th December, 1939, of the four kinds specified in clause (c). The present alienation was by the decree-holder after 20th December, 1939, and therefore the appellant cannot say that she is not covered by section 37-A because she was a *bona fide* transferee for value. Reading therefore the wide language used in section 37-A (8) with section 37-A (1) (c), it is clear that once the sale is set aside, even alienees from the decree-holder would be liable to be ejected and would be covered by the words "any person" used in the latter part of section 37-A (8) unless they were alienees of the four kinds mentioned in section 37-A (1) (c). We are therefore of opinion that the High Court was right in holding that persons like the appellant were covered by section 37-A of the Act.

The appeal therefore fails and is hereby dismissed. In the circumstances we order parties to bear their own costs.

V. S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, J. R. MUDHOLKAR AND R. S. BACHAWAT, JJ.

Sarangadeva Periya Matam and another

*Appellants**

v.

Ramaswami Goundar (dead) by legal representatives

Respondents.

Limitation Act (IX of 1908), section 28 and Article 144—Perpetual lease, without legal necessity, of properties belonging to a math by its matadhipathi—Lessee ceasing to pay rent after the death of the matadhipathi granting the lease and possessing the demised properties on his own behalf—Adverse possession against the math when commences—If commences only from the date of appointment of a successor matadhipathi.

Under Article 144 of the Limitation Act, 1908, limitation for a suit by a math or by any person representing it, for possession of immovable properties belonging to it, runs from the time when the possession of the defendant becomes adverse to the plaintiff. The math is the owner of the endowed property. Like an idol, the math is a juristic person having the power of acquiring, owning and possessing properties and having the capacity of suing and being sued. Being an ideal person, it must of necessity act in relation to its temporal affairs through human agency. It may acquire property by prescription and may likewise lose property by adverse possession. If the math while in possession of its property is dispossessed or if the possession of a stranger becomes adverse, it suffers an injury and has the right to sue for the recovery of the property. If there is a legally appointed matadhipathi, he may institute the suit on its behalf, if not, the *de facto* matadhipathi may do so and where necessary, a disciple or other beneficiary of the math may take steps for vindicating its legal rights by the appointment of a receiver having authority to sue on its behalf or by the institution of a suit in its name by a next friend appointed by the Court. With due diligence, the math or those interested in it may avoid the running of time. The running of limitation against the math under Article 144 is not suspended by the absence of a legally appointed matadhipathi; clearly, limitation would run against it where it is managed by a *de facto* matadhipathi and it would run equally if there is neither a *de jure* nor a *de facto* matadhipathi.

The office of a matadhipathi carries with it the right to manage and possess the endowed properties on behalf of the math and the right to sue on its behalf for the protection of those properties. During his office, the matadhipathi has also large beneficial interests in the math properties. But by virtue of his office, he can possess and enjoy only such properties as belong to the math. If before his appointment limitation under Article 144 of the Limitation Act has commenced to run against the math, the

pointment does not give either the math or the matadhipathi a new right of suit for a fresh starting point of limitation under that Article for recovery of the property.

In the absence of legal necessity, a matadhipathi has no power to grant a perpetual lease of the math properties at a fixed rent. Such a lease granted without legal necessity will not endure beyond the lifetime of the matadhipathi granting the lease.

Where, therefore, a matadhipathi of a math grants, without legal necessity, a perpetual lease of the math properties for a fixed rent and after his death the lessee ceases to pay any rent and possesses the properties on his own behalf, adverse possession of the demised properties commences to run against the math on the death of the matadhipathi who granted the lease. Consequently, limitation under section 28 read with Article 144 of the Limitation Act, 1908, for a suit to recover such properties begins to run from the date of the death of the matadhipathi granting the lease; the running of time will not be suspended till a successor to the deceased matadhipathi is appointed.

Appeal by Special Leave from the Judgment and Decree dated the 16th July, 1959, of Madras High Court in Second Appeal No. 513 of 1957.

A. V. Viswanatha Sastri, Senior Advocate (*S. S. Javali* and *R. Ganapathy Iyer*, Advocates, with him), for Appellants.

R. K. Garg, *S. C. Agarwal*, *D. P. Singh* and *M. K. Ramamurthi*, Advocates, of *M/s. Ramamurthi & Co.*, for Respondents.

The Judgment of the Court was delivered by

Bachawat, J.—Shri Sarangadeva Periya Matam of Kumbakonam was the inamholder of lands in Kannibada Zamin, Dindigul Taluk, Madurai District. In 1883, the then matadhipathi granted a perpetual lease of the melwaram and kudiwaram interest in a portion of the inam lands to one Chinna Gopiya Gounder, the grandfather of the plaintiff-respondent on an annual rent of Rs. 70. The demised lands are the subject-matter of the present suit. Since 1883 until January, 1950 Chinna Gopiya Gounder and his descendants were in uninterrupted possession and enjoyment of the suit lands. In 1915, the matadhipathi died without nominating a successor. Since 1915, the descendants of Chinna Gopiya Gounder did not pay any rent to the math. Between 1915 and 1939 there was no matadhipathi. One Basavan Chetti was in management of the math for a period of 20 years from 1915. The present matadhipathi was elected by the disciples of the math in 1939. In 1928, the Collector of Madurai passed an order resuming the inam lands, and directing full assessment of the lands and payment of the assessment to the math for its upkeep. After resumption, the lands were transferred from the "B" Register of inam lands to the "A" Register of ryotwari lands and a joint patta was issued in the name of the plaintiff and other persons in possession of the lands. The plaintiff continued to possess the suit lands until January, 1950 when the math obtained possession of the lands. On 18th February, 1954, the plaintiff instituted the suit against the math represented by its present matadhipathi and an agent of the math claiming recovery of possession of the suit lands. The plaintiff claimed that he acquired title to the lands by adverse possession and by the issue of a ryotwari patta in his favour on the resumption of the inam. The Subordinate Judge of Dindigul accepted the plaintiff's contention, and decreed the suit. On appeal, the District Judge of Madurai set aside the decree and dismissed the suit. On Second Appeal, the High Court of Madras restored the judgment and decree of the Subordinate Judge. The defendants now appeal to this Court by Special Leave. During the pendency of the appeal, the plaintiff-respondent died and his legal representatives have been substituted in his place.

The plaintiff claimed title to the suit lands on the following grounds. (1) Since 1915 he and his predecessors-in-interest were in adverse possession of the lands, and on the expiry of 12 years in 1927 he acquired prescriptive title to the lands under section 28 read with Article 144 of the Indian Limitation Act, 1908; (2) by the resumption proceedings and the grant of the ryotwari patta a new tenure was created in his favour and he acquired full ownership in the lands; and (3) in any event, he was in adverse possession of the lands since 1928, and on the expiry of 12 years in 1940 he acquired prescriptive title to the lands, under section 28 read

with Article 134-B of the Indian Limitation Act, 1908. We are of the opinion that the first contention of the plaintiff should be accepted, and it is, therefore not necessary to consider the other two grounds of his claim.

In the absence of legal necessity, the previous matadhipathi had no power to grant a perpetual lease of the math properties at a fixed rent. Legal necessity is neither alleged nor proved. But the matadhipathi had power to grant a lease which could endure for his lifetime. The lease of 1883, therefore, endured during the lifetime of the previous matadhipathi and terminated on his death in 1915. Since 1915, the plaintiff and his predecessors-in-interest did not pay any rent to the math, and they possessed the lands on their own behalf adversely to the math. Before the insertion of Article 134-B in the Indian Limitation Act, 1908 by Act I of 1929, the suit for recovery of the lands from the defendants would have been governed by Article 144. The controversy is about the starting point of limitation of a suit for the recovery of the math properties under Article 144. Did the limitation commence on the date of the death of the previous matadhipathi, or did it commence on the date of election of the present matadhipathi?

On behalf of the appellants, Mr. Ganapathy Iyer contended that the right to sue for the recovery of the math properties vests in the legally appointed matadhipathi and adverse possession against him cannot run until his appointment. In support of his contention, he relied upon the minority judgment of a Full Bench of the Madras High Court in *Venkateswara v. Venkatesa*¹, *Kameswara Rao v. Somanna*², and *Manikkam Pillai v. Thanikachalam Pillai*³. He argued that this view has received legislative sanction in Article 96 of the Indian Limitation Act, 1963. He relied upon the following observations in *Jagadindra Nath Roy v. Hemanta Kumari Devi*⁴,

"The possession and management of the dedicated property belongs to the shebait. And this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the shebait and not in the idol."

Relying on *Murray v. The East India Company*⁵ and *Meyappa Chetty v. Supramanian Chetty*⁶, and several decisions under Articles 120 and 110 of the Indian Limitation Act, 1910, he submitted that the cause of action does not accrue and time does not commence to run unless there is someone who can institute the suit. Relying on *Radhamoni Devi v. Collector of Khulna*⁷ and *Srischandra Nayak v. Bajnath Jugal Kishore*⁸, he contended that before possession can be adverse there must be a competitor who by due vigilance could avoid the running of time.

Mr. Garg on behalf of the respondents contended that adverse possession commenced to run against the math on the death of the matadhipathi who granted the lease and the operation of the Limitation Act is not affected by the fact that there was no legal manager of the math. In support of his contention, he relied upon the majority judgment of the Full Bench of the Madras High Court in *Venkateswara's case*¹, *Manmohan Haldar v. Dibendu Prosad Ray Chaudhuri*⁹ and *Administrator-General of Bengal v. Balkissen Mitter*¹⁰. Relying on *Pramatha Nath Mullick v. Pradyumna Kumar Mullick*¹¹, he submitted that a math, like an idol, has a juridical status with the power of suing and being sued. He argued that in the absence of a legally appointed matadhipathi, a *de facto* manager could institute a suit for recovery of the math properties, and the beneficiaries of the endowment could take appropriate steps for the recovery, and, in any event, the mere absence of machinery for the institution of the suit would not suspend the running of limitation.

We are inclined to accept the respondent's contention. Under Article 144 of the Indian Limitation Act, 1908, limitation for a suit by a math or by any person

1. I.L.R. 1941 Mad. 597; (1941) 1 M.L.J. 644; A.I.R. 1941 Mad. 449 (F.B.).
2. (1954) 2 M.L.J. (Andhra) 228; A.I.R. 1955 Andh. Pra. 212.
3. A.I.R. 1917 Mad. 706, 706 (1).
4. (1904) I.L.R. 32 Cal. 129, 141.
5. (1821) 5 B. & All. 204, 217.

6. (1916) L.R. 43 I.A. 113, 120.
7. (1900) L.R. 27 I.A. 136.
8. I.L.R. 14 Pat. 327 P.C.
9. I.L.R. (1949) 2 Cal. 263.
10. (1924) I.L.R. 51 Cal. 953, 957-960.
11. 49 M.L.J. 30; L.R. 52 I.A. 245, 250; A.I.R. 1925 P.C. 139.

representing it for possession of immovable properties belonging to it runs from the time when the possession of the defendant becomes adverse to the plaintiff. The math is the owner of the endowed property. Like an idol, the math is a juristic person having the power of acquiring, owning and possessing properties and having the capacity of suing and being sued. Being an ideal person, it must of necessity act in relation to its temporal affairs through human agency. See *Babajirao v. Laxmandas*¹. It may acquire property by prescription and may likewise lose property by adverse possession. If the math while in possession of its property is dispossessed or if the possession of a stranger becomes adverse, it suffers an injury and has the right to sue for the recovery of the property. If there is a legally appointed matadhipathi, he may institute the suit on its behalf; if not, the *de facto* matadhipathi may do so, see *Mahadso Prasad Singh v. Karia Bharti*²; and where, necessary, a disciple or other beneficiary of the math may take steps for vindicating its legal rights by the appointment of a receiver having authority to sue on its behalf, or, by the institution of a suit in its name by a next friend appointed by the Court. With due diligence, the math or those interested in it may avoid the running of time. The running of limitation against the math under Article 144 is not suspended by the absence of a legally appointed matadhipathi; clearly, limitation would run against it where it is managed by a *de facto* matadhipathi, see *Vithalbawa v. Narayan Daji Thite*³, and we think it would run equally if there is neither a *de jure* nor a *de facto* matadhipathi.

A matadhipathi is the manager and custodian of the institution. See *Vidya Varuthi Thirtha v. Balusami Ayyar*⁴. The office carries with it the right to manage and possess the endowed properties on behalf of the math and the right to sue on its behalf for the protection of those properties. During the tenure of his office, the matadhipathi has also large beneficial interests in the math properties. See *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Srirur Mutt*⁵. But by virtue of his office, he can possess and enjoy only such properties as belong to the math. If the title of the math to any property is extinguished by adverse possession, the rights of all beneficiaries of the math in the property are also extinguished. On his appointment, the matadhipathi acquires no right to recover property which no longer belongs to the math. If before his appointment limitation under Article 144 has commenced to run against the math, the appointment does not give either the math or the matadhipathi a new right of suit or a fresh starting point of limitation under that Article for recovery of the property. In the instant case, the present matadhipathi was elected in 1939 when the title of the math to the suit lands was already extinguished by adverse possession. By his election in 1939 the present matadhipathi could not acquire the right to possess and enjoy or to recover properties which no longer belonged to the math.

In *Jagadindra Nath Roy's case*⁶, the dispossession of the idol's lands took place in April, 1876. The only shebait of the idol was then a minor, and he sued for recovery of the lands in October, 1889 within three years of his attaining majority. The Privy Council held that the plaintiff being a minor at the commencement of the period of limitation was entitled to the benefit of section 7 of the Indian Limitation Act (XV of 1877) corresponding to section 6 of the Indian Limitation Act, 1908 and was entitled to institute the suit within three years of his coming of age. This decision created an anomaly, for, as pointed out by Page, J., in *Administrator-General of Bengal v. Balkissen Misser*⁷, in giving the benefit of section 7 of the Indian Limitation Act, 1877 to the shebait, the Privy Council proceeded on the footing that the right to sue for possession is to be divorced from the proprietary right to the property which is vested in the idol. We do not express any opinion

1. (1904) I.L.R. 28 Bom. 215, 223.
2. (1934) 68 M.L.J. 499; L.R. 62 I.A. 47, 51;
A.I.R. 1935 P.C. 44.
3. (1893) I.L.R. 18 Bom. 507, 511.
4. (1921) L.R. 48 I.A. 302 at 311, 315;
I.L.R. 44 Mad. 831; 41 M.L.J. 346; A.I.R.

1922 P.C. 123.

5. (1954) S.C.J. 335; (1954) 1 M.L.J. 596;
(1954) S.C.R. 1005, 1008-1020; A.I.R. 1954 S.C.
282.

6. (1904) I.L.R. 32 Cal. 129.

7. (1924) I.L.R. 51 Cal. 953 at 958.

one way or the other on the correctness of *Jagadindra Nath Roy's case*¹. For the purposes of this case, it is sufficient to say that we are not inclined to extend the principle of that case. In that case, at the commencement of the period of limitation there was a shebait in existence entitled to sue on behalf of the idol, and on the institution of the suit he successfully claimed that as the person entitled to institute the suit at the time from which the period is to be reckoned, he should get the benefit of section 7 of the Indian Limitation Act, 1877. In the present case, there was no matadhipathi in existence in 1915 when limitation commenced to run. Nor is there any question of the minority of a matadhipathi entitled to sue in 1915 or of applying section 6 of the Indian Limitation Act, 1908.

For these reasons, we hold that the time under Article 144 of the Indian Limitation Act, 1908 commenced to run in 1915 on the death of the matadhipathi, who granted the lease, and the absence of a legally appointed matadhipathi did not prevent the running of time under Article 144. We, therefore, agree with the answer given by the majority of the Judges to the third question referred to the Full Bench of the Madras High Court in *Venkateswara's case*². We express no opinion on the interpretation of Article 134-B of the Indian Limitation Act, 1908 or Article 96 of the Indian Limitation Act, 1963. Under Article 96 of the Indian Limitation Act, 1963, the starting point of limitation in such a case would be the date of the appointment of the plaintiff as manager of the endowment, but this Article cannot be considered to be a legislative recognition of the law existing before 1929.

We hold that by the operation of Article 144 read with section 28 of the Indian Limitation Act, 1908 the title of the math to the suit lands became extinguished in 1927, and the plaintiff acquired title to the lands by prescription. He continued in possession of the lands until January, 1950. It has been found that in January, 1950 he voluntarily delivered possession of the lands to the math, but such delivery of possession did not transfer any title to the math. The suit was instituted in 1954 and is well within time.

In the result, the appeal is dismissed with costs.

V.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—A. K. SARKAR, J. R. MUDHOLKAR AND R. S. BACHAWAT, JJ.

Lakhmi Chand Khemani

*Appellant**

v.

Kauran Devi

Respondent.

Delhi Rent Control Act (LIX of 1958), sections 2 (1) and 50—Decree in ejectment against a tenant under the previous Delhi and Ajmer Rent Control Act, 1952—Not executable—If still a tenant under section 2 (1)—Civil suit against him for possession—If barred under section 50—Slum Areas (Improvement and Clearance) Act, 1956, section 19.

The only question in the instant appeal to the Supreme Court by Special Leave is whether a tenant of premises in Delhi against whom a decree in ejectment under the provisions of Delhi and Ajmer Rent Control Act, 1952, had been passed, which decree was not executable for want of consent of the Slum Commissioner under section 19 of the Slum Areas (Improvement and Clearance) Act, 1956, is still a tenant under section 2 (1) of the Delhi Rent Control Act, 1958, and therefore a civil suit against him for possession is barred under section 50 thereof.

Held.—Delhi Rent Control Act, 1958, section 2 (1) clearly excluded from the definition of 'tenant' "a person against whom any order or decree for eviction had been made" and section 50 bars the jurisdiction of a civil Court to try a suit for eviction of a tenant—tenant as defined in the Act.

1. (1904) I.L.R. 32-Cal. 129.

2. (1941) 1 M.L.J. 644 : I.L.R. (1941) Mad.

599: A.I.R. 1941 Mad. 449 at pp. 614, 615, 633, 634 (F.B.).

* C.A. No. 641 of 1965.

Section 19 of the Slum Areas Act, 1956, only says that a person who has obtained a decree against a tenant shall not be entitled to execute it without the previous permission of the prescribed authority. It is not concerned in any way with the question whether such a person continues to be a tenant within the meaning of the Rent Act.

Section 2 (1) of the 1958 Act must be read by itself and its meaning cannot be affected by any considerations derived from section 19 of the Slum Areas Act.

The High Court was certainly right in holding that the civil Court had jurisdiction to decide the nature of possession (as a trespasser) and the order of remand to the trial Court was proper.

Appeal by Special Leave from the Judgment and Decree dated the 12th May, 1964, of the Punjab High Court (Circuit Bench) at Delhi in Regular First Appeal No. 209-D of 1962.

C. B. Agarwala, Senior Advocate, (*A. G. Ratnaparkhi*, Advocate, with him), for Appellant.

Bishan Narain, Senior Advocate (*Ravinder Narain*, Advocate of *M/s. J. B. Dada, Chanji & Co.*, with him), for Respondent.

The Judgment of the Court was delivered by

Sarkar, J.—This appeal was filed with Special Leave of this Court granted on 14th August, 1964. Various interesting questions of law were sought to be raised on behalf of the appellant but in our view they do not arise at this stage. The appeal must be confined to the points decided in the Courts below.

The case appears to us to be somewhat out of the ordinary. One Mehtab Singh was the owner of a certain building known as Akbar Building, situate in Mohalla Ganda Nala, Gali Rajan, Delhi. The appellant was a tenant under him in respect of certain accommodation in the building. On 3rd June, 1955, Mehtab Singh filed a suit under the Delhi and Ajmer Rent Control Act, 1952, against the appellant for his ejection. On 11th October, 1956, that suit was decreed. The appellant filed an appeal against that decree which, however, was dismissed on 27th March, 1957. He thereafter moved the High Court of Punjab in revision but here also he was unsuccessful. The precise date of the dismissal of the application in revision does not appear on the record but it was sometime between March and September, 1957.

On 8th February, 1957, an Act called the Slum Areas (Improvement and Clearance) Act, 1956, came into force in Delhi. By a notification issued under section 3 of this Act, the area in which the building with which we are concerned was situate, was declared a slum area for the purposes of the Act which meant that the buildings in that area were unfit for human habitation or that for various reasons they were detrimental to safety, health or morals of human beings. The date of this notification does not appear from the record but it is not in dispute that it was issued before September, 1957.

Sub-section (1) of section 19 of this Act which is the provision on which the appellant's case is principally based, is in these terms :

Section 19 (1).—"Notwithstanding anything contained in any other law for the time being in force, no person who has obtained any decree or order for the eviction of a tenant from any building in a slum area shall be entitled to execute such decree, or order except with the previous permission in writing of the competent authority."

When after the dismissal of the Revision Petition against the ejection decree Mehtab Singh sought to execute the decree, he was faced with the difficulty created by this provision. He thereupon applied to the specified authority for permission to execute the decree but this was refused on 12th September, 1957. He appealed to the appellate authority mentioned in that Act but that appeal was rejected on 7th January, 1958.

Being thus baffled in his attempts to get possession of the accommodation occupied by the appellant, in execution of the ejection decree, Mehtab Singh sold the building to the respondent on 21st August, 1961. On or about 28th March, 1962, the respondent filed a suit against the appellant for possession

of the rooms in the latter's occupation. This suit was filed in the Court of a Sub Judge of Delhi which was an ordinary civil Court. The respondent stated in the plaint that she had purchased the property from the previous owner Mehtab Singh who had obtained an ejection decree against the appellant on 11th October, 1956 and that in view of the decree the appellant's possession of the rooms was unauthorised and he was a trespasser. The respondent based her claim to recover possession of the rooms from the appellant on the aforesaid ground, namely, that he was a trespasser. In defence the appellant contended that section 19 of the Slum Areas Act barred the suit and also that no civil Court had jurisdiction to entertain it in view of section 50 of the Delhi Rent Control Act, 1958, which had come into force on 19th February, 1959, repealing the Delhi and Ajmer Rent Control Act, 1952, in so far as that Act applied to Delhi, as he continued to be a tenant of the rooms in spite of the decree in favour of Mehtab Singh of 11th October, 1956.

The learned Subordinate Judge hearing the suit framed the following five issues :—

- " (1) Whether the plaintiff is the owner of the premises in suit?
- (2) Whether the defendant is in unauthorised occupation of the premises in dispute and is not a tenant in the same?
- (3) Whether the suit is barred under section 19 of the Slum Areas (Clearance and Improvement Act, 1956)?
- (4) Whether the civil Court has jurisdiction to try this suit?
- (5) Relief."

On the first issue he held that the respondent had proved her ownership of the premises and this finding has not been challenged in any subsequent proceeding. He decided Issues Nos. 2 and 3 together and held that the real question involved in them was whether the appellant was a tenant. He observed that section 2 (i) of the Delhi Rent Control Act, 1958, no doubt provided that a tenant for the purpose of the Act would "not include any person against whom any order or decree for eviction has been made" but he held that the words "order or decree for eviction" in the provision meant an executable decree or order. He then said that as the prescribed authority under the Slum Areas Act had refused permission to Mehtab Singh to execute his decree in ejection, that decree was not an executable decree and, therefore, it could not be said that the appellant was not a tenant although a decree for eviction had been passed against him. In this view of the matter he held that the appellant must be deemed to have continued to be a tenant under Mehtab Singh and the respondent who was a transferee from Mehtab Singh had no better rights in the properties than what Mehtab Singh had. Apparently, the learned Subordinate Judge held that after the respondent purchased the property, the appellant had become her tenant. He observed that if the contention of the respondent that the appellant had ceased to be a tenant as a result of the decree was accepted, section 19 of the Slum Areas Act would be rendered nugatory. He was not prepared to accept a view which led to such a result. As it was not in dispute that if the appellant was a tenant he had no jurisdiction to entertain the suit in view of section 50 of the Act of 1958, the learned Subordinate Judge dismissed the suit for want of jurisdiction and decided Issues Nos. 4 and 5 accordingly.

The respondent appealed against this judgment to the High Court of Punjab. The High Court expressed the view that the words which we have quoted from the definition of "tenant" in section 2 (1) of the Act of 1958 applied even though the decree in ejection had ceased to be executable as of right in view of the provision of section 19 of the Slum Areas Act. It held that section 50 of the Act of 1958, which barred the jurisdiction of a civil Court to entertain suits for ejection against "tenants" did not take away the learned Subordinate Judge's jurisdiction to try the respondent's suit, for the appellant was no longer a tenant after the decree of 11th October, 1956, directing his eviction. It appears also to have been argued before the learned Judges of the High Court that when an order in ejection had once been made against a tenant, another order could not be passed against him, irrespective of whether the earlier order was made inexecutable by a statute or not.

Dealing with this argument, Dua, J., who delivered the judgment of the Court, observed,

"This broad proposition, in my opinion, may not always hold good, but, in any event, the institution of the suit and the jurisdiction of the civil Court to try the same can scarcely be held barred on this ground. Whether or not to pass a decree or order for eviction on the ground that such an order had already been passed, may have to be determined on the merits of the particular controversy on its own circumstances, the question scarcely, affects the jurisdiction of the Court to entertain and try the suit."

The High Court concluded by saying,

"For the reasons foregoing, we are clearly of the view that the order of the Court below is erroneous and allowing the appeal we set aside the judgment and decree of the learned Subordinate Judge and remit the case back to the trial Court for further proceedings in accordance with law in the light of the observations made above."

It would thus appear that the only point which the High Court decided was whether the Subordinate Judge had jurisdiction to try the suit. It refused to go into the question whether on the merits the suit would succeed and remitted the case back to the Subordinate Judge apparently because he had not considered those merits, that is to say, whether in view of the earlier ejectment decree a fresh ejectment decree could be passed. It is clear from what we have said about the judgment of the learned Subordinate Judge that he had not in fact gone into the merits of the case and had only held that in view of section 19 of the Slum Areas Act he had no jurisdiction to entertain the suit as the appellant remained a 'tenant' within the meaning of that word in the Act of 1958 notwithstanding the decree in ejectment against him.

In this appeal the only question that we have to consider is whether the High Court was right in passing the order remanding the case to the learned Subordinate Judge for trial on the merits. That would depend on whether the High Court was right in its view that notwithstanding section 19 of the Slum Areas Act rendering the decree against him inexecutable, the appellant ceased to be a tenant within the meaning of the Act of 1958 because of that decree. Before proceeding to discuss the question, we think it proper to observe that if the High Court was right in its view about the appellant ceasing to be a tenant, it was fully justified in passing the order of remand. It was not called upon to decide whether the suit might succeed on the merits. That question had not been decided by the learned Subordinate Judge and it did not strictly arise in the appeal before the High Court. The High Court was certainly entitled to the views of the learned Subordinate Judge on it.

We are unable to agree with the learned Subordinate Judge that a tenant remained a tenant in spite of the definition in section 2 (1) of the Act of 1958 and notwithstanding a decree in ejectment earlier passed against him, because, in view of the refusal of the authority concerned to grant sanction to execute the decree under section 19 of the Slum Areas Act, that decree was for the moment inexecutable. The Act of 1958 quite clearly excluded from the definition of "tenant" a person against whom any order or decree for eviction had been made, that is to say, under it a tenant who had suffered a decree in ejectment was no more a tenant. Section 50 of this Act says,

"No Civil Court shall entertain any suit or proceeding in so far as it relates to eviction of any tenant under section 14."

Section 14 provides for an order in ejectment being made by the Controller appointed under the Act on any of the grounds mentioned in it but not otherwise. Section 50, therefore, bars the jurisdiction of a civil Court to try a suit for the eviction of a tenant, that is to say, a tenant as defined in the Act. It would not bar a suit for eviction against a person who is not a tenant as so defined. Under the ordinary law applicable to landlords and tenants, a tenant who has suffered an ejectment decree is not considered a tenant any more; he has after the decree none of the rights which as tenant he earlier possessed.

We find no justification for changing the definition of tenant in the Act of 1958 by drawing upon the provisions of the Slum Areas Act as the learned Subordinate Judge did. The last-mentioned Act is not concerned with relations between

landlords and tenants as such; it does not purport to interfere directly with the ordinary contractual rights of landlords and tenants either as to rent or as to recovery of possession. However, that may be, we find nothing in section 19 of the Slum Areas Act to which alone we were referred by learned Counsel for the appellant for the purpose, to warrant the view suggested that a tenant within the Act of 1958 would include a tenant against whom a decree in ejectment has been passed. Section 19 only says that a person who has obtained a decree in ejectment against a tenant shall not be entitled to execute it without the previous permission of the prescribed authority. It does not say that a tenant suffering the decree still continues to be a tenant for any purpose. The section does not purport to define the word "tenant" in any way. It assumes that a decree of eviction has been passed against a tenant. The expression "decree or order for the eviction of a tenant" in section 19 necessarily contemplates a person who was prior to the decree a tenant within the meaning of the Rent Act of 1958 or any of its predecessors. The section is not in any way concerned with the question whether the tenants suffering a decree in ejectment still continue to be such tenants within the meaning of the Rent Act. It is of some importance to point out in this connection that the Slum Areas Act making ejectment decrees against tenants inexecutable without the requisite permission came into existence before the Act of 1958. It is pertinent to observe that notwithstanding this, the latter Act excluded from the definition of "tenant" one who had suffered an ejectment decree. Obviously, the Act of 1958 did not contemplate that the Slum Areas Act would in any way affect the definition of tenant contained in it. No question as to what the rights of a tenant against whom a decree in ejectment has been passed in view of section 19 of the Slum Areas Act are, arises in this appeal, the only point being whether he is a tenant within the Act of 1958 so as to oust the jurisdiction of a civil Court to entertain the suit. We think he is not, for section 2 (1) of the Act of 1958 must be read by itself and its meaning cannot be affected by any consideration derived from section 19 of the Slum Areas Act.

We may now refer to *Jyoti Pershad v. The Administrator for the Union Territory of Delhi*¹, to which our attention was drawn. That case is, in our view, of no assistance. It deals with the contention whether the Slum Areas Act was unconstitutional as it affected fundamental rights of landlords. That is not a question that arises in this appeal. This Court in its judgment no doubt stated that to buildings in slum areas both the Slum Areas Act and the Act of 1958 would apply and also that the former Act afforded some protection to tenants against eviction. As we have earlier stated, we are not concerned in this appeal with any question as to the protection given by the Slum Areas Act to tenants, nor as to the result of the application of both the Acts to a particular case. This Court did not say that the result of applying both the Acts to a case was to make part of the definition of "tenant" in the Act of 1958 nugatory; that was not a question that arose. All that the Court said was that a tenant was entitled to all such benefits as each Act independently conferred on him. Again, when, the judgment stated that the Slum Areas Act protected tenants, it did not purport to define the word "tenant" for the purpose of the Acts. This Court certainly did not say that notwithstanding the definition in section 2 (1) of the Act of 1958 a person would remain a tenant within the meaning of that Act in spite of the order of eviction. That question did not arise for decision. This case does not help the appellant at all.

It was then pointed out that section 50 of the Act of 1958 also provided that

"no civil Court shall entertain.....any proceeding in so far as it relates.....to any....matter which the Controller is empowered by or under this Act to decide...."

It was said that section 25 of that Act provided that when an order has been made by the Controller for recovery of possession of premises from a tenant, he will give vacant possession of the premises to the landlord by removing all persons in possession thereof. It was contended that in view of these two provisions the learned Subordi-

nate Judge had no jurisdiction to entertain the respondent's suit. This argument seems to us to proceed on a misapprehension. First, we do not think that the argument correctly states the effect of section 25. It seems to us that all that the section does is to state who shall be bound by an order of eviction passed by the Controller and how effect shall be given to it. It is unnecessary, however, to express a final opinion on the effect of section 25, for, in any event, clearly section 42 of the Act provides that the Controller shall have power to execute orders made under the Act. If the Controller has the power to execute orders made under the Act including orders for eviction—and that is all that learned Counsel for the appellant now contends—all that will happen in view of that part of section 50 of the Act of 1958 on which reliance is now placed is that a civil Court will not be able to execute an order for eviction. This however has nothing to do with the point before us. The learned Subordinate Judge was not asked to execute any decree for eviction. He was asked to decide whether the appellant was a trespasser and so liable to eviction. It does not follow that because a civil Court cannot execute a decree for eviction passed by the Controller, it cannot also decide the question whether a tenant against whom such an order has been passed has ceased to be a tenant and become a trespasser. The present contention, therefore, must be rejected.

We are told that after the High Court had passed its order of 12th May, 1964, remanding the case to the Subordinate Judge for trial on the merits, the Subordinate Judge heard the suit and passed a decree in favour of the respondent on 12th August, 1964. This, if correct, must have happened because no order for stay of the proceedings pursuant to the order of remand had been obtained from the High Court. A plain copy of the judgment of the learned Subordinate Judge of 12th August, 1964, was handed over to us by learned Counsel for the appellant and from that it appears that he thought that since the High Court had held that the appellant was not a tenant within the meaning of the Act of 1958 after the decree in ejectment of 11th October, 1956, it must be held that the respondent's contention that the appellant's possession of the rooms was unauthorised was correct. It is for this reason that the learned Subordinate Judge appears to have passed his decree for eviction of the appellant of 12th August, 1964. We wish, however, to observe that we are not aware that the copy of the judgment is a correct copy. We have referred to it only to say that even if correct, it does not affect the question which we have to decide. We are also informed that the appellant has filed an appeal in the High Court from this judgment of the learned Subordinate Judge and that appeal is pending. It will be for the High Court now to decide the correctness of the decree of the learned Subordinate Judge of 12th August, 1964, and it is not right that we should express any opinion on that question and we do not do so.

The result, therefore, is that this appeal fails and it is dismissed with costs.

K.G.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, J. C. SHAH AND S. M. SIKRI, JJ.

Modi Sugar Mills Ltd.

.. *Appellant**

v.

The Commissioner of Sales Tax, U.P.

.. *Respondent.*

U.P. Sales Tax Act (XV of 1948), section 7 (1) and U.P. Sales Tax Rules, rules 39, 40, 41 and Form IV—Assessment of dealer in prior years—Basis return of turnover for the previous year—Dealer electing to submit quarterly returns for the assessment year—Previous sanction of Sales Tax Commissioner—Not necessary.

A dealer who had been assessed to sales tax in the prior years on the returns of turnover for the previous year can elect the assessment year by filing quarterly returns (under rule 41) without the previous sanction of the Sales Tax Commissioner. Rule 39 (2) of the Rules mentions an election under sub-rule (1) and there is only one kind of election under rule 39 (1) and that is for a dealer to elect to submit returns of his turnover for the assessment year in lieu of his turnover for the previous year.

Appeal by Special Leave from the Judgment and Order dated the 25th July, 1961, of the Allahabad High Court in Sales Tax Reference No. 460 of 1954.

A. V. Viswanatha Sastri, Senior Advocate (*K. K. Jain*, Advocate, with him), for Appellant.

C. B. Agarwala, Senior Advocate (*O. P. Rana*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Sikri, J.—This appeal by Special Leave is directed against the judgment of the High Court of Judicature at Allahabad passed in a reference made to it under section 11 of the U.P. Sales Tax Act, 1948 (U.P. Act XV of 1948)—hereinafter referred to as the Act. In this reference the following question was referred by the Judge (Revision), Sales Tax at the instance of the appellant, Modi Sugar Mills Ltd., hereinafter called the assessee:

"Whether a dealer who has been assessed to tax on the turnover of the previous year according to his election can change his option and elect the assessment year by filing quarterly returns without the previous sanction of Sales Tax Commissioner?"

The High Court answered the question in the negative.

The answer to this question depends upon the interpretation of section 7 (1) of the Act, and rules 39, 40 and 41 of the U.P. Sales Tax Rules, and Form IV prescribed under these rules. These provisions are as under:

"Section 7 (1).—Subject to the provisions of section 18 every dealer whose turnover in the previous year is Rs. 12,000 or more in a year shall submit such return or returns of his turnover of the previous year within sixty days of the commencement of the assessment year in such form and verified in such manner as may be prescribed :

Provided that the Provincial Government may prescribe that any dealer or class of dealers may submit, in lieu of the return or returns specified in this section, a return or returns of his turnover of the assessment year at such intervals, in such form and verified in such manner as may be prescribed, and thereupon all the provisions of this Act shall apply as if such return or returns had been duly submitted under this section:

Provided further that the assessing authority may in his discretion extend the date of the submission of the return by any person or class of persons.

.....
Rule 39—Election of assessment year.—(1) Any dealer may elect to submit returns of his turnover of the assessment year in lieu of the returns of the turnover of the previous year, and shall signify such election in the return filed by him in Form IV:

Provided that a dealer who did not carry on business during the whole of the previous year shall elect to submit his returns of the assessment year.

(2) A dealer who has once signified his election under sub-rule (1) shall not again exercise his option so as to vary the basis of assessment :

Provided that the Sales Tax Commissioner may, for reasons to be recorded in writing and on such conditions as he deems fit permit a dealer to exercise a fresh option.

Rule 40—Submission of returns.—Every dealer who elects to submit return of his previous year shall, within sixty days of the commencement of the assessment year, submit to the Sales Tax Officer a return in Form IV showing his turnover for the previous year :

Provided that no dealer whose turnover in the previous year was less than Rs. 15,000 shall be required to furnish such returns.

Rule 41—Returns of assessment year.—(1) Every dealer whose estimated turnover during the assessment year is not less than Rs. 15,000 and who elects to submit returns of such year shall before the last day of July, October, January and April submit to the Sales Tax Officer, a return of his gross turnover for the quarters ending June 30, September 30, December 31 and March 31, respectively, in Form IV:

Provided that every dealer or firm, to whom the provisions of sub-section (3) of section 18 are applicable shall submit such returns within seven days of the expiry of each month during the year in which the business is commenced."

Before we deal with the interpretation of the section and the rules it is necessary to give a few relevant facts. It appears that for the assessment years 1948-49, 1949-50 and 1950-51, the assessee was assessed on the basis of returns filed for the turnover of the previous year relevant to each of these assessment years. For the

assessment year 1951-52, however, the assessee purporting to make an election under rule 39 of the Rules filed returns of his turnover of the assessment year instead of the returns of the turnover of the previous year. The Judge (Revision) held that without sanction of the Sales Tax Commissioner the assessee was not entitled to do so.

Mr. Sastri, the learned Counsel for the assessee, submits that the above rules should be interpreted as follows: Under sub-rule (1) of rule 39 the election is to file returns of the turnover of the assessment year instead of returns of the turnover of the previous year and not *vice versa*. Sub-rule (2) also deals with the same election, i.e., the election to file returns of the turnover of the assessment year instead of the turnover of the previous year. Rule 40 does not displace the above reading of rule 39 because it covers the case of every dealer who wishes to submit a return of the turnover of the previous year. There is no other rule which deals with such a dealer, and he says that the word 'elects' may perhaps have reference to the election mentioned in Form IV which we will presently consider. At any rate, he says that sub-rule (2) of rule 39 has nothing to do with the election mentioned in rule 40. He then submits that rule 41 is concerned with the dealer who has elected under rule 39 (1) to submit returns of the turnover of the assessment year and this rule provides various matters in this connection.

The learned Counsel for the State, Mr. C. B. Agarwala, on the other hand, contends that section 7 of the Act, read with the rules, gives a dealer an option to file returns in respect of the turnover of the previous year or returns of the turnover of the assessment year, and he says that this option is and can only be exercised in the first year when a dealer becomes taxable under the Act, and it is this option or election that is covered by sub-rule (2) of rule 39. He relies strongly on Form IV in which the following lines occur:

" I have elected to submit return of my turnover of the previous year ending

 month or months of the assessment year."

In the alternative he contends that even if rule 39 (2) does not cover the filing of the returns of the previous year, according to general principles the assessee having exercised an option to be assessed in respect of the turnover of the previous year cannot now change the basis of assessment.

In our opinion the Judge (Revision) was in error in holding that the assessee was not entitled to make an election under rule 39 (1) without the sanction of the Sales Tax Commissioner, and the answer to the question referred to the High Court should be in favour of the assessee. Rule 39 (2) specifically mentions an election under sub-rule (1) and there is only one kind of election under rule 39 (1) and that is for a dealer to elect to submit returns of his turnover for the assessment year in lieu of the return of the turnover of the previous year. In other words, under rule 39 (1) the dealer makes a choice that he will be assessed in respect of the turnover not of the previous year, which is normally the rule under section 7, but in respect of the return of the turnover of the assessment year. It seems to us that rule 39 (2) covers only the case where election has been made by a dealer to be assessed in respect of the turnover of the assessment year. It is true that rule 40 also uses the word 'elects' but this may have reference to the lines in Form IV which we have already reproduced above. But assuming that when a dealer submits a return in respect of the previous year under rule 40 and he is treated to have elected within rule 40, yet there is no provision like rule 39 (2) which debars him from exercising the option under rule 39 (1). In our opinion an express provision like rule 39 (2) was necessary to prevent a dealer from exercising the option given to him under rule 39 (1). We do not express any opinion whether such a rule could validly be made under section 7 (1). We are not impressed by the argument of Mr. Agarwala that general principles debar the assessee from exercising the option under rule 39 (1). It is a statutory right given to the assessee and the general principles, if applicable, cannot displace the statutory right.

We may mention that the reasoning in the judgment under appeal has been doubted in an unreported judgment of the Allahabad High Court in *Messrs. Mahesh Company Kahoo Kothi, Kanpur v. The Commissioner of Sales Tax, Uttar Pradesh*¹.

In the result we accept the appeal, and answer the question referred to the High Court in the affirmative. The appellant will have his costs here and in the High Court.

K.S.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, M. HIDAYATULLAH AND V. RAMASWAMI, JJ.

Eramma

*Appellant**

v.

Veerupana and others

Respondents.

Hindu Succession Act (XXX of 1956), section 8—Male Hindu dying intestate before the commencement of the Act—Section not retrospective—Inapplicable to a case of succession opening before the Act—Section 14—Property possessed by a female Hindu—Property with some kind of title contemplated—No conferment of title in case no title was possessed—Hindu male dying leaving wives—Hindu Women's Right to Property Act of 1937, not in operation then—Possession of widow as against the adopted son of another wife—No enlargement of estate—Trespasser.

A male Hindu died in 1936 leaving behind him his three wives and at that time the Hindu Women's Right to Property Act of 1937 was not in force. Pending execution of the decree obtained by the adopted son of one of the widows for possession of properties against the other widows, the Hindu Succession Act of 1956 came into force. On the question of the applicability of sections 8 and 14 of the Hindu Succession Act of 1956 to the case of the widows in possession of the property.

Held, the provisions of section 8 of the Act providing for the devolution of the property of the male Hindu dying intestate, are not retrospective in operation and where a male Hindu died before the Act came into force, i.e., where succession opened before the Act, section 8 of the Act will have no operation.

The property possessed by a female Hindu, as contemplated in section 14 of the Act, is clearly property to which she has acquired some kind of title whether before or after the commencement of the Act. It does not in any way confer a title on the female Hindu where she did not in fact possess an vestige of title. The provisions of section 14 (1) of the Act cannot be attracted in the case of a Hindu female who is in possession of the property of the last male holder on the date of the commencement of the Act when she is only a trespasser without any right to property.

Appeal from the Judgment and Decree dated the 9th June, 1965, of the Mysore High Court in R.A. No. 90 of 1957.

S. P. Sinha, Senior Advocate (*E. C. Agarwala* and *P. C. Agarwala*, Advocates with him), for Appellant.

S. V. Gupta, Solicitor-General of India (*R. V. Pillai*, Advocate, with him), for Respondents Nos. 1 and 2.

M. M. Kshatriya and *R. Thiagrajan*, Advocates, for Respondent No. 3.

The Judgment of the Court was delivered by

Ramaswami, J.—This appeal is brought by the Judgment-debtor, Eramma against the judgment and decree dated 9th June, 1965, in R.A. No. 90 of 1957 of the High Court of Mysore setting aside the order of the District Judge of Raichur dated 14th February, 1957, dismissing an execution petition.

The appellant—Eramma—and the third respondent—Siddamma—were, at the relevant time, widows of Eran Gowda who also had a third wife—Sharnamma. By the said Sharnamma, Eran Gowda had a son called Basanna who died in the year 1347-F. (corresponding to 1936-37 A.D.) at a time when he was the sole male holder of the property in dispute. After his death his step-mothers Eramma and Siddamma got into possession of the properties. Respondents 1 and 2 thereafter

1. S.T.R. No. 1623 of 1956, judgment delivered on 13th March, 1963.

*C.A. No. 742 of 1965.

18th November, 1965.

filed a suit in the Sadar Adalat, Gulbarga, claiming that they, as the nearest heirs of Basanna, were entitled to all the properties left by him and seeking to recover possession thereof from his step-mothers—Eramma and Siddamma. The suit was contested by Eramma on the ground that she had adopted Sogan Gouda, respondent No. 4 on the basis of the authority alleged to have been given to her by her husband Eran Gowda. It was claimed by Siddamma that she had adopted Sharnappa, respondent No. 5 on the basis of the authority alleged to have been conveyed under a will. The trial Court rejected the case of Eramma but upheld that of Siddamma. On appeal to the High Court, Siddamma's claim of adoption was also negatived. In the result the High Court passed a decree in favour of respondents 1 and 2. Eramma and Siddamma thereafter applied to the High Court for a certificate of fitness to appeal to this Court. Siddamma was granted such certificate but the High Court refused to grant a certificate to Eramma who filed an application in this Court for Special Leave. During the pendency of these proceedings the Hindu Succession Act, 1956, came into force with effect from 17th June, 1956. Respondents 1 and 2 have put to execution the decree granted by the High Court in their favour. Eramma filed an objection in the execution Court on the ground that she had been in possession of half the properties since the death of her husband and the decree was non-executable in view of the provisions of the Hindu Succession Act, 1956, and that she had now become full owner of the properties of which she is in possession. The case of Eramma was accepted by the District Judge, Raichur who dismissed the execution case on 14th February, 1957. Respondents 1 and 2 preferred an appeal to the Mysore High Court against the order of the District Judge dismissing the execution case. The appeal was allowed by the High Court on the ground that the Hindu Succession Act, 1956, was not applicable to the case and Eramma did not acquire full ownership under section 14 (1) of that Act. The High Court accordingly set aside the order of the District Judge, dated 14th February 1957, dismissing the execution case and restored the execution case to file of the District Judge for being dealt with in accordance with law.

On behalf of the appellant Mr. Sinha contended, in the first place, that under section 8 of the Hindu Succession Act the appellant being the step-mother is entitled to inherit the properties of Baswan Gouda in preference to respondents 1 and 2. Mr. Sinha conceded that Baswan Gouda died on 23rd October, 1936, long before the coming into operation of Hindu Succession Act. It was however, submitted for the appellant that section 8 of the Hindu Succession Act was retrospective in operation and the appellant must be held to be in possession of the properties in her own right. In our opinion, the submission of Mr. Sinha is not warranted by the language of section 8 which is to the following effect :—

“8. The property of a male Hindu dying intestate shall devolve according to the provisions of this chapter:—

- (a) firstly, upon the heirs, being the relatives specified in class I of the Schedule ;
 - (b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule ;
 - (c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased ;
- and

(d) lastly, if there is no agnate, then upon the cognates of the deceased.”

There is nothing in the language of this section to suggest that it has retrospective operation. The words “The property of a male Hindu dying intestate” and the words “shall devolve” occurring in the section make it very clear that the property whose devolution is provided for by that section must be the property of a person who dies after the commencement of the Hindu Succession Act. Reference may be made, in this connection, to section 6 of the Act which states :

“6. When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

Provided that if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims, through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession as the case may be, under this Act and not by survivorship.

.....”

It is clear from the express language of the section that it applies only to coparcenary property of the male Hindu holder who dies after the commencement of the Act. It is manifest that the language of section 8 must be construed in the context of section 6 of the Act. We accordingly hold that the provisions of section 8 of the Hindu Succession Act are not retrospective in operation and where a male Hindu died before the Act came into force *i.e.*, where succession opened before the Act, section 8 of the Act will have no application.

It was next contended by the appellant that she was admittedly in possession of half the properties of her husband Eran Gowda after he died in 1341-F and by virtue of section 14 of the Hindu Succession Act she became the full owner of the properties and respondents 1 and 2 cannot, therefore, proceed with the execution case. We are unable to accept this argument as correct. At the time of Eran Gowda's death the Hindu Women's Right to Property Act, 1937 (XVIII of 1937) had not come into force. It is admitted by Mr. Sinha that the Act was extended to Hyderabad State with effect from 7th February, 1953. It is manifest that at the time of promulgation of the Hindu Succession Act, 1956 the appellant had no manner of title to properties of Eran Gowda. Section 14 (1) of the Hindu Succession Act states :

"14. (1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner."

Explanation.—In this sub-section, 'property' includes both movable and immovable property acquired by a female Hindu by inheritance or device, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act."

It is true that the appellant was in possession of Eran Gowda's properties but that fact alone is not sufficient to attract the operation of section 14. The property possessed by a female Hindu, as contemplated in the section, is clearly property to which she has acquired some kind of title whether before or after the commencement of the Act. It may be noticed that the *Explanation* to section 14 (1) sets out the various modes of acquisition of the property by a female Hindu and indicates that the section applies only to property to which the female Hindu has acquired some kind of title, however restricted the nature of her interest may be. The words "as full owner thereof and not as a limited owner" as given in the last portion of sub-section (1) of section 14 clearly suggest that the Legislature intended that the limited ownership of a Hindu female should be changed into full ownership. In other words section 14 (1) of the Act contemplates that a Hindu female who, in the absence of this provision, would have been limited owner of the property, will now become full owner of the same by virtue of this section. The object of the section is to extinguish the estate called 'limited estate' or 'widow's estate' in Hindu Law and to make a Hindu woman, who under the old law would have been only a limited owner, a full owner of the property with all powers of disposition and to make the estate heritable by her own heirs and not revertible to the heirs of the last male holder. The *Explanation* to sub-section (1) of section 14 defines the word 'property' as including "both movable and immovable property acquired by a female Hindu by inheritance or device.....". Sub-section (2) of section 14 also refers to acquisition of property. It is true that the *Explanation* has not given any exhaustive connotation of the word 'property' but the word 'acquired' used in the *Explanation* and also in sub-section (2) of section 14 clearly indicates that the object of the section is to make a Hindu female a full owner of the property which she has already acquired or which she acquires after the enforcement of the Act. It does not in any way confer a title on the female Hindu where she did not in fact possess any vestige of title. It follows, therefore, that the section cannot be interpreted so as to validate the illegal possession of a female Hindu and it does not confer any title on a mere trespasser. In other words, the provisions of section 14 (1) of the Act cannot be attracted in the case of a Hindu female who is in possession of the property.

of the last male holder on the date of the commencement of the Act when she is only a trespasser without any right to property.

For these reasons we hold that the judgment of the High Court is correct and this appeal should be dismissed. We do not propose to make any order as to costs.

V.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, V. RAMASWAMI AND P. SATYANARAYANA RAJU, JJ.

Jahiruddin and others

.. *Appellants**

v.

K. D. Rathi, Factory Manager, The Model Mills, Nagpur Ltd., and others

.. *Respondents.*

Central Provinces and Berar Industrial Disputes Settlement Act (XXIII of 1947), section 16—Nature of right conferred under—Notification of State Government exempting a textile mill from operation of section 16—Employees of the said mill dismissed while such notification was in force—Exemption withdrawn later—Applications by dismissed employees thereafter under section 16 for reinstatement—Maintainability.

On 25th March, 1960 the State of Bombay in exercise of the powers conferred by sections 3 and 4 of the Bombay Relief Undertakings (Special Provisions) Act, 1958, made a notification declaring the respondent, a textile mill, to be a "relief undertaking" for a period of one year commencing from 26th March, 1960 and ending with 25th March, 1961. The notification further directed that, among others, the provisions of section 16 of the Central Provinces and Berar Industrial Disputes Settlement Act (XXIII of 1947) shall not apply to the respondent mill during the period the notification was in force. The appellants were, at the relevant time, the employees of the respondent mill. On 6th January, 1961 when the aforesaid notification was in force, the appellants were dismissed from service. On 4th April, 1961 the exemption of the respondent mill from the application of section 16 of the C.P. and Berar Act (XXIII of 1947) was withdrawn. Thereafter on 25th April, 1961 the appellants filed applications under section 16, before the Assistant Commissioner of Labour, claiming reinstatement. and the same was ordered.

On behalf of the respondent it was pointed out that the exemption of the respondent mill from the operation of section 16 of the C.P. and Berar Act (XXIII of 1947), was withdrawn only on 4th April 1961, while the employees were dismissed on 6th January, 1961, when the exemption was in force. Hence it was argued that the appellants had no right to file applications under section 16 and the applications filed by them were not maintainable. On behalf of the employees it was contended that though the respondent was exempt from the operation of section 16 on the date when the appellants were dismissed, there was an existing industrial dispute relating to an industrial matter on 4th April, 1961, when the notification withdrawing the exemption in favour of the respondent mill from the operation of section 16 was issued, that on the date when the employees filed the applications, the period of six months provided by that section had not elapsed and that therefore the appellants could invoke the provisions of section 16 and claim reinstatement.

Held, the applications filed by the appellants were maintainable.

After the passing of the Industrial Disputes Act, 1947, at any rate, the right of a dismissed employee to claim reinstatement, in proper cases, had been recognised. Therefore, it cannot be said that the right of an employee to claim reinstatement has been granted by section 16 of the C.P. and Berar Act (XXIII of 1947). The right to claim reinstatement on a wrongful dismissal exists *de hors* section 16. Section 16 only recognises the right of a dismissed employee, in appropriate cases, to

claim reinstatement but does not confer the right. It only provides a forum for the dismissed employee to claim reinstatement. In this view, the right of the dismissed employee to claim reinstatement was in existence even during the period of exemption, but only it could not be enforced under section 16. Once the exemption was withdrawn the *status quo ante* was restored and it was open to the dismissed employee to file an application for reinstatement under section 16, provided, however, his application was made, as required by sub-section (2) of section 16, within the period of six months from the date of his dismissal.

Appeal by Special Leave from the Judgment and Order, dated the 12th August, 1963, of the Bombay High Court (Nagpur Bench) in Special Civil Application No. 315 of 1962.

V. P. Sathe and *A. G. Ratnaparkhi*, Advocates, for Appellant.

M. N. Phadke, Advocate, and *J. B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, for Respondents Nos. 1 and 3.

N. S. Bindra, Senior Advocate, (*B. R. G. K. Achar*, Advocate, with him), for Respondent No. 4.

The Judgment of the Court was delivered by

Satyandrayana Raju, J.—This is an appeal, by Special Leave, against the judgment of a Division Bench of the Bombay High Court dismissing an application for the issue of a writ of *certiorari* under Article 226 of the Constitution to quash the order of the State Industrial Court at Nagpur.

For a proper appreciation of the questions that have been raised in the appeal, it would be necessary to state the material facts. The Model Mills, Nagpur (hereinafter referred to as the Mills) is a public limited company incorporated under the Indian Companies Act. On 18th July, 1959, in exercise of the powers conferred by section 18-A of the Industries (Development and Regulation) Act, 1951, the Central Government took over the management of the Mills and appointed the third respondent as the authorised Controller of the Mills. On 25th March, 1960, the State of Bombay (now the State of Maharashtra), in exercise of the powers conferred by sections 3 and 4 of the Bombay Relief Undertakings (Special Provisions) Act, 1958 (hereinafter referred to as the Bombay Act) made a notification declaring the Mills to be a "relief undertaking for a period of one year commencing from 26th March, 1960 and ending with 25th March, 1961. The appellants, eight in number, were, at the relevant time, the permanent employees of the Mills. It would be convenient to refer to them as 'employees'. On 15th December, 1960, when the notification made by the State Government under the Bombay Act was in force, the employees abstained from work. Thereupon, the 1st respondent who is the Factory Manager of the Mills issued notices to the employees to show cause why they should not be dismissed from service for joining an 'illegal strike'. On 6th January, 1961, the Factory Manager passed orders dismissing the employees from service. On 12th January, 1961, the employees filed an application in the High Court of Bombay for the issue of a writ of *mandamus* directing the employees to be reinstated in service. On 4th April, 1961, the exemption of the Mills from the application of section 16 of the Central Provinces and Berar Industrial Disputes Settlement Act. (XXIII of 1947) (hereinafter called the State Act) was withdrawn. On 25th April, 1961, the employees filed applications before the Assistant Commissioner of Labour claiming reinstatement with back wages. The High Court dismissed the Writ Petition filed by the employees with liberty to file a fresh petition, if necessary, since they were prosecuting their applications for relief of reinstatement before the Assistant Commissioner of Labour. In and by his order, dated 29th September, 1961, the Assistant Commissioner allowed the applications filed by the employees. He held that as there was no illegal strike the orders of dismissal were unsustainable and should be set aside. He directed that the employees should be reinstated with back wages.

Against the orders passed by the Assistant Commissioner, the Mills preferred applications in revision to the State Industrial Court. By its order, dated 16th February, 1962, the Industrial Court allowed the revision applications filed by the Mills on the ground that the applications before the Assistant Commissioner were not maintainable. On the merits, the Industrial Court agreed with the Assistant Commissioner that there was no illegal strike.

Aggrieved by the orders of the Industrial Court, the employees filed an application under Articles 226 and 227 of the Constitution for the issue of a writ of *certiorari* to quash the orders of dismissal passed by the Factory Manager and to direct their reinstatement with back wages. By its judgment dated 12th August, 1963, the High Court dismissed the writ petition filed by the employees.

The High Court has held that the right to claim reinstatement is not a right which is available to an employee under the Common Law and that the relief of reinstatement is a special right which has been conferred on an employee under section 16 of the State Act. In the opinion of the High Court, the essential precondition for an employee to claim relief under section 16 is that he is an employee in an industry to which that section is applicable and in respect of which a notification under section 16 (1) also has been issued. The High Court has reached this conclusion by reason of the fact that the State Government issued a notification exempting the Mills from the operation of section 16 of the State Act and that the exemption was withdrawn only on 4th April, 1961, while the employees were dismissed on 6th January, 1961. In the opinion of the High Court, by reason of the fact that section 16 of the Act was not applicable, the dismissal of the employees even if it was wrongful did not give them a right to claim reinstatement and that to hold otherwise would be to give retrospective operation to section 16 of the State Act which became applicable to the Mills on and from 4th April, 1961, by reason of the withdrawal of the exemption. In the result, the High Court confirmed the finding of the State Industrial Court that the employees had no right to file applications under section 16 of the State Act and the applications filed by them before the Assistant Commissioner were not maintainable.

Now it is contended by Mr. Sathe on behalf of the employees that though the industry was exempt from the operation of certain sections including section 16 of the Act, on the date when the appellants were dismissed, there was an existing industrial dispute relating to an industrial matter between the employees and the Mills on 4th April, 1961, when the notification withdrawing the exemption in favour of the Mills from the operation of section 16 of the State Act was issued by the Government, that on the date when the employees filed an application under section 16 before the Commissioner of Labour, the period of six months provided by that section had not elapsed and that therefore the employees could invoke the provisions of section 16 and claim reinstatement. The learned Counsel for the Mills, Mr. Phadke, has endeavoured to support the judgment of the High Court and the reasons on which its conclusions were rested.

The questions which arise for determination in this appeal are :

1. Whether the right of a dismissed employee to claim reinstatement, in appropriate cases, exists *de hors* section 16 of the State Act?

2. Whether by reason of the State Government's exemption of the industry from the operation of section 16 on the date when the employees were dismissed from service, their right to apply for reinstatement ceased to exist?

For a proper determination of the above questions, it is necessary to refer to the material statutory provisions. The State Act became law on 2nd June, 1947. Section 15 of the State Act empowers the State Government to appoint any person

as Labour Commissioner for the State and he shall exercise all or any of the powers of the Labour Commissioner. Now section 16 of the State Act as it stood at the relevant date provides as follows :

“(1) Where the State Government by notification so directs, the Labour Commissioner shall have power to decide an industrial dispute touching the dismissal, discharge, removal or suspension of an employec working in any industry in general or in any local area as may be specified in the notification.

(2) Any employee, working in an industry to which the notification under sub-section (1) applies, may, within six months from the date of such dismissal, discharge, removal or suspension, apply to the Labour Commissioner for reinstatement and payment of compensation for loss of wages.

* * * * *

The different powers that could be exercised by the Labour Commissioner are then set out in sub-section (3):

“On receipt of such application, if the Labour Commissioner, after such enquiry as may be prescribed, finds that the dismissal was in contravention of any of the provisions of this Act or in contravention of a Standing Order..... he may direct that the employee shall be reinstated forthwith or by a specified date and paid for the whole period from the date of dismissal to the date of the order of the Labour Commission.”

It is common ground that section 16 is made applicable to the textile industry with effect from 1st March, 1951, by a notification, dated 22nd February, 1951. The provisions of section 16 were thus applicable to the Mills till 25th March, 1960, on which date, however, the State Government issued a notification in exercise of the powers conferred under sections 3 and 4 of the Bombay Act declaring the Mills to be a ‘relief undertaking.’ The notification directed that the provisions of section 16 of the State Act and Chapter V-A of the Industrial Disputes Act (XIV of 1947) (Lay-off and Retrenchment) shall not apply to the Mills and that it shall be exempt therefrom. This notification was extended by the State Government on 8th March, 1961, for a further period of one year. A subsequent notification, dated 4th April, 1961, issued by the State of Bombay amended the earlier notification by withdrawing the exemption in so far as it related to section 16 of the State Act.

The alleged participation by the employees in an illegal strike occurred on 15th December, 1960 and the first respondent dismissed the employees in and by his order, dated 6th January, 1961. It was during the period between 25th March, 1960, and 4th April, 1961, when the exemption was in force that the incident which resulted in the Mills framing a charge against the employees and the subsequent orders of dismissal were passed.

It is submitted by the learned Counsel on behalf of the Mills that the right of an employee to claim reinstatement has been granted by section 16 of the State Act and since the Mills were exempt from the provisions of that section on the material dates the employees had no right to claim reinstatement. The Industrial Disputes Act (XIV of 1947) came into force on 1st April, 1947. For our present purposes, it is not necessary to consider whether the right to claim reinstatement by a dismissed employee existed before the Central Act became law. The question about the jurisdiction of an Industrial Tribunal to direct reinstatement of a dismissed employee was raised as early as 1949, before the Federal Court in *Western India Automobile Association v. Industrial Tribunal, Bombay*¹. In that case, the Federal Court considered the larger question about the powers of Industrial Tribunals in all its aspects and rejected the argument of the employer that to invest the Tribunal with jurisdiction to order reinstatement amounts to giving it authority to make a contract between two persons when one of them is unwilling to enter into a contract of employment at all. This argument, it was observed,

“overlooks the fact that when a dispute arises about the employment of a person at the instance of a trade union or a trade union objects to the employment of a certain person, the definition of industrial dispute would cover both those cases. In each of those cases, although the

1. (1949) F.L.J. 154 : (1949) 1 M.L.J. 179 : (1949) F.C.R. 321 : A.I.R. 1949 F.C. 111.

employer may be unwilling to do, there will be jurisdiction in the Tribunal to direct the employment or non-employment of the person by the employer."

The Federal Court also added :

"The disputes of this character being covered by the definition of the expression 'industrial disputes', there appears no logical ground to exclude an award of reinstatement from the jurisdiction of the Industrial Tribunal."

For nearly two decades the decision of the Federal Court has been accepted without question. Therefore, after the Industrial Disputes Act, 1947, at any rate, the right of a dismissed employee to claim reinstatement in proper cases has been recognised. It is no doubt true that under the Central Act the right to claim reinstatement has to be enforced in the manner laid down by that statute, whereas under the State Act it is open to an employee to claim reinstatement without the intervention of the appropriate Government. This would not however make any difference.

It is argued that by reason of the exemption granted by the Bombay State when it declared the Mills to be a 'relief undertaking' rights and obligations which accrued to the employees or were incurred by the Mills during the period of exemption, stood abrogated. This takes us to the question as to the legal effect of the exemption granted by the State of Bombay. The notification issued by the State of Bombay is in the following terms:

"The Government of Bombay hereby directs that in relation to the said relief undertaking and in respect of the said period of one year for which that relief undertaking continues as such, the provisions of (i) sections 16, 31 and 37, section 40 (in so far as it relates to lock-out) and section 51 and section 61 (in so far as it relates to clauses (b) and (c) of Rule 36 of the Central Provinces and Berar Industrial Disputes Settlement Rules, 1949) Central Provinces and Berar Act XXIII of 1947 and (ii) Chapter V-A of the Industrial Disputes Act, 1947 (XIV of 1947) shall not apply and the said relief undertaking shall be exempt from the aforesaid provisions of the Central Provinces and Berar Industrial Disputes Settlement Act, 1947 (Central Provinces and Berar Act XXIII of 1947) and the Industrial Disputes Act, 1947 (XIV of 1947)."

The contention urged on behalf of the Mills proceeds on the assumption that the right to claim reinstatement has been 'granted' by section 16 of the State Act. As we have already stated, section 16 only recognises the right of a dismissed employee, in appropriate cases, to claim reinstatement but does not confer the right. The section provides the procedure for enforcing the right. In this view, the right of the dismissed employee to claim reinstatement was in existence even during the period of exemption, but only it could not be enforced under section 16. Once the exemption is withdrawn the *status quo ante* is restored and it is open to the employee to file an application for reinstatement provided, however, his application is within the period of six months from the date of his dismissal.

Under section 4 (1) (a), on a notification being made, the industry becomes relief undertaking and the laws enumerated in the Schedule to the Bombay Act shall not apply. The Schedule specifies Chapter V-A of the Industrial Disputes Act and section 16 of the State Act. Section 4 (1) (a) (i) also provides that the relief undertaking shall be exempt from the operation of the Acts mentioned in the Schedule.

Learned Counsel drew a distinction between the expressions 'exemption' and 'suspension' by relying upon the meanings given to these words in the Oxford Dictionary. 'Exemption' means 'immunity from a liability' whereas the word 'suspension' means 'put it off'. Basing himself on the dictionary meanings, learned Counsel for the Mills has contended that the word 'exemption' is of a wider connotation than 'suspension' and means that the industry shall be immune from the liabilities arising under the statutes specified in the Schedule and that the order of dismissal having been passed while the exemption was in force, the Mills are immune from liability to reinstate the employees on their dismissal being held to be wrongful.

The order dismissing the employees was passed on 6th January, 1961 when the notification was in force. The employees filed applications before the Commissioner of Labour on 25th April, 1961. On the date of their applications, the exemption granted to the Mills by the State Government was no longer in operation.

The decision in *Birla Brothers, Ltd. v. Modak*¹, has firmly established the principle that for a dispute which originated before the Industrial Disputes Act came into force but was in existence on the date when that Act became law, the Act applied to the dispute since it was in existence and continuing on that date and no question of giving retrospective effect to the Act arose. At page 221, the learned Chief Justice Harries, who spoke for the Court stated thus :

"In my judgment, the Act of 1947 clearly applies to the present dispute without any question arising of giving the Act any retrospective effect. It is true the dispute arose before the Act was passed, but on 1st April, 1947, when the Act came into force, the dispute was in existence and continuing. The employees were on strike and the strike actually continued until 19th May, that is, five days after the Government made the order referring the dispute to arbitration. In my judgment, the Act must apply to any dispute existing after it came into force, no matter when that dispute commenced. There is nothing in the Act to suggest that it should apply only to disputes which originated after the passing of the Act. On the contrary, the opening words of section 10 of the Act make it clear that the Act would apply to all disputes existing when it came into force. The opening words of section 10 (1) are—

"If any industrial dispute exists or is apprehended, the appropriate Government may, by order in writing, etc."

It seems to me that these words make it abundantly clear that the Act applies to any industrial dispute existing when it came into force and, therefore, the Act applies to this dispute."

It is argued by Mr. Phadke that the notification, dated 4th April, 1961, withdrawing the exemption is only prospective and no retrospective effect can be given to it. This argument proceeds on a fallacy. There is no question of the notification withdrawing an exemption being prospective or retrospective.

It is finally submitted by learned Counsel for the Mills that the validity of the order passed by the Factory Manager dismissing the employees from service has not been determined by the High Court and that the matter must be remitted to that Court for a consideration of that question. We may point out that the Assistant Commissioner of Labour has held that the dismissal is wrongful. This conclusion is affirmed by the Industrial Court. The validity of the dismissal was therefore finally concluded in favour of the employees. There is therefore no question of the validity of the dismissal order now being considered by the High Court.

We may now summarise the conclusions reached by us as a result of the above discussion. The right of an employee to claim reinstatement on a wrongful dismissal exists *de hors* section 16 of the State Act. Section 16 provides a forum for a dismissed employee to claim reinstatement but does not create a right. The effect of an exemption granted by the notification issued under the Bombay Act is not to destroy the right but to suspend the remedy prescribed by section 16 for enforcing that right during the period when the exemption remains in force. The right can be enforced by a dismissed employee by resorting to the provisions of section 16 of the Act provided he makes the application within six months from the date of his dismissal. In the present case, the appellants filed their applications within the period specified in section 16 of the State Act. The High Court was in error in holding that the applications were not maintainable.

In the result the judgment of the High Court and the order of the Industrial Court are set aside and the award made by the Assistant Commissioner of Labour is restored. The appeal is allowed and the appellants will have their costs in this Court paid by respondent No. 1.

V.K.

Appeal allowed

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYATULLAH, V. RAMASWAMI AND P. SATYANARAYANA RAJU, JJ.

Mohd. Idris and others

.. Appellants*

v.

Sat Narain and others

.. Respondent.

U.P. Agriculturist Relief Act (XXVII of 1934), section 12—U.P. Zamindari Abolition and Land Reforms Act (I of 1951) (as amended by U.P. Acts XVI of 1953 and XVIII of 1956)—U.P. General Clauses Act, section 6—Suit under section 12 of U.P. Agriculturist Relief Act for redemption of a usufructuary mortgage filed before 1st July, 1952—During pendency of the suit repeal of U.P. Agriculturist Relief Act by U.P. Act XVI of 1953 with retrospective effect from 1st July, 1952—Effect—If suit rendered incompetent.

A suit for redemption of a usufructuary mortgage was filed on 27th May, 1952 under section 12 of the U. P. Agriculturist Relief Act by the successors-in-interest of a mortgagor against the successors-in-interest of the mortgagee. While this suit was pending U.P. Act XVI of 1953, which amended the U.P. Zamindari Abolition and Land Reforms Act (I of 1951), repealed the U.P. Agriculturist Relief Act with retrospective effect from 1st July, 1952. Thereupon the successors-in-interest of the mortgagees claimed that as the U.P. Agriculturist Relief Act was repealed by U.P. Act XVI of 1953 the suit under section 12 of the U.P. Agriculturist Relief Act filed against them was rendered incompetent and the plaintiff could not eject them except in accordance with the provisions of the U.P. Zamindari Abolition and Land Reforms Act.

Held, the suit for redemption was not rendered incompetent after the coming into force of U.P. Act XVI of 1953.

The U.P. Agriculturist Relief Act was repealed retrospectively from 1st July, 1952 only and it is not therefore possible to give the repeal further retrospectivity so as to affect a suit pending from before that date. The pending suit was not affected by the passing of the U.P. Zamindari Abolition and Land Reforms Act or the U.P. Act XVI of 1953, regard being had to the provisions of section 6 of the U.P. General Clauses Act in the first instance and more so in view of the provisions of section 23 of U.P. Act XVIII of 1956.

Appeal by Special Leave from the Judgment and Order dated the 9th October, 1961 of the Allahabad High Court in Civil Revision No. 1077 of 1957.

C.B. Agarwala, Senior Advocate, (*E. C. Agarwala* and *P. C. Agarwala*, Advocates, with him), for Appellants.

S. P. Sinha, Senior Advocate (*M. I. Khowaja*, Advocate, with him), for Respondents Nos. 2 to 7.

The Judgment of the Court was delivered by

Hidayatullah, J.—This is an appeal by Special Leave against an order passed by the Allahabad High Court in Civil Revision No. 1077 of 1957 dated 9th October, 1961 in a suit in which a decree for redemption on an application under section 12 of the U.P. Agriculturist Relief Act has been passed. The appellants are the successors-in-interest of one Suleman who was the original mortgagee. The original respondent in this appeal Sat Narain was the successor-in-interest of one Jantari who was the original mortgagor. Subsequently, Sat Narain sold his interest to others who have been ordered by us to be joined as respondents under Order 22, rule 10 of the Code of Civil Procedure on their application in this behalf (C.M.P. No. 2081 of 1965). The land in dispute measures 5 *bighas* and 3 *biswas* (*Khata* No. 2 situate in Bhagwatipura, pargana Kewai, district Allahabad) and consists of 5 plots Nos. 26, 27, 29, 30 and 32. Jantari had mortgaged the said land with Suleman on 4th October, 1929 and the mortgage, now it is admitted, was usufructuary in nature. It is also admitted now that the land was *Sir Sankalap* of Jantari.

On 27th May, 1952, Sat Narain filed an application under section 12 of the U.P. Agriculturist Relief Act in the Court of the Munsif (East), Allahabad on the allegation that the mortgage had been paid off from the usufruct of the land and he was entitled to redeem it. As required by the Agriculturist Relief Act the claim was made in the prescribed form and set out the accounts by reason of which it was claimed that the mortgage was satisfied. The defendants, who represented Suleman (the mortgagee) opposed the application. Two written statements were filed on 4th October, 1952 and 31st March, 1953. Both the statements alleged that the plaintiff was not an agriculturist and hence the suit was not maintainable under section 12 of the U. P. Agriculturist Relief Act. They also stated that the mortgage was not satisfied from the usufruct as the land was not productive. One of the written statements denied even the mortgage. All the defendants claimed that they had become *Sirdars* by reason of the U.P. Zamindari Abolition and Land Reforms Act and that the suit was not, therefore, maintainable. Although the Abolition Act had come into force from 1st July, 1952 no other claim was set up. Nor was the suit challenged as incompetent by reason of any provisions of the Abolition Act.

The learned Munsif framed five issues which he decided in favour of the plaintiff before him. He held that there was a mortgage as alleged; that the plaintiff and the original mortgagor were agriculturists; and that the mortgage had been satisfied from the usufruct. He also held that the defendants (mortgagees) had not become *Sirdars* and the suit was maintainable. In the result he passed a decree in favour of the plaintiff on 24th November, 1953. The defendants appealed to the District Court but by a judgment dated 17th April, 1957 their appeal was dismissed. All the above findings were confirmed by the Civil Judge, Allahabad who disposed of the appeal. The main point which was urged before the appellate Court was that as the U.P. Agriculturist Relief Act was repealed by an Act in 1953 which amended the Abolition Act, the suit under section 12 of the U.P. Agriculturist Relief Act was rendered incompetent and the plaintiffs could not eject the representatives of the mortgagee except in accordance with the provisions of the Abolition Act. This contention was not accepted by the learned Civil Judge, Allahabad. An application for revision was then filed in the High Court but it was dismissed by the order impugned in this appeal as the decree of the Munsif had already been executed and possession had been delivered on 1st May, 1957 to the successor-in-interest of the original mortgagor. Mr. Justice Mithan Lal who decided the revision held that no interference was called for as the property had gone back to the original owner and substantial justice had already been done. From the last order the present appeal has been filed by Special Leave of this Court.

The only question that has been urged before us is whether the suit is competent. The U.P. Agriculturist Relief Act was intended to confer certain benefits upon the agriculturists. One such benefit was that an agriculturist mortgagor was afforded an easy remedy to redeem a mortgage made by him. He could, under section 12 of that Act apply, notwithstanding anything in section 83 of the Transfer of Property Act or any contract to the contrary, for an order directing that the mortgage be redeemed, and, where the mortgage was with possession, that the mortgagor agriculturist be put in possession of the mortgage property. It is clear that on 27th May, 1952 when the application under section 12 of the Agriculturist Relief Act was filed the provisions of that Act including section 12 were available. The competency of the proceedings is challenged because in 1953 in amending the U.P. Zamindari Abolition and Land Reforms Act, 1950, the Agriculturist Relief Act was repealed and certain kinds of suits were to go under section 339 of the Abolition Act read with Schedule 3, List I before certain Revenue Officers. Item 13-A was added in that List by section 67 of the Act XVI of 1953 and it repealed the U.P. Agriculturist Relief Act. Schedule 3, List I of the Abolition Act conferred jurisdiction on Assistant Collectors, First Class to eject *asamis*. The question which is raised in this appeal is whether after this was done, the suit which was still pending, could continue before the Munsif and on the application under the U.P. Agriculturist Relief Act. In support of their case the appellants contend that the ejectment of an *asami* or a *Sirdar* can only be under the provisions of the Abolition Act and no other law.

The appellants claim to have become *asamis* by reason of the provisions of the Abolition Act although they had claimed in the High Court and the Courts below that they had become *Sirdars*. We have, therefore, to consider in this appeal what was the status of the representatives of the mortgagor on the one hand and of the mortgagee on the other, and then to decide whether the Munsif was competent to pass the decree for redemption and to order the ejectment of the present appellants. It may be stated at once that we declined to hear arguments on the other pleas of the appellants which have now been concurrently rejected in the first two Courts.

The claim that the appellants became the *Sirdars* of this land is abandoned before us because the land was the *Sir Sankalap* of the mortgagor and the provisions of section 14 (2) (a) exclude a mortgagee with possession from claiming that right in respect of such land. Section 14 (2) (a) reads :

“ 14. *Estate in possession of a mortgagee with possession.*—

(1) * * * * *

(2) Where any such land was in the personal cultivation of the mortgagee on the date immediately preceding the date of vesting—

(a) if it was *sir* or *khudkasht* of the mortgagor on the date of mortgage, the same shall, for purposes of section 18, be deemed to be the *sir* or *khudkasht* of the mortgagor or his legal representative ;

* * * * *

By reason of this section the land continued to be the *sir* or *khudkasht* of the mortgagor. The learned Munsif pointed out that, even though the representatives of the mortgagee had obtained a certificate as *Sirdars*, they could not enjoy that status, in view of section 14 (2) (a). The appellants now claim to be *asamis* under section 21 (1) (d). That provision runs :

“ 21. *Non-occupancy tenants sub-tenants of grove lands and tenant's mortgagees to be asamis.*—

(1) Notwithstanding anything contained in this Act, every person who, on the date immediately preceding the date of vesting, occupied or held land as—

* * * * *

(d) a mortgagee in actual possession from a person belonging to any of the classes mentioned in clauses (b) to (e) of sub-section (1) of section 18 or clauses (i) to (vii) and (ix) of section 19.

* * * * *

They claim further that under section 200 no *asami* can be ejected from his holding except as provided in the Abolition Act and refer to section 202 (c) where the procedure for the ejectment of an *asami* who belongs to the class mentioned in clause (d) of sub-section (1) of section 21 is provided. Section 202 (c) reads :

“ 202. *Procedure of ejectment of asami.*

Without prejudice to the provisions of section 338, an *asami* shall be liable to ejectment from his holding on the suit of the Gaon Samaj or landholder, as the case may be on the ground or grounds :

* * * * *

(c) that he belongs to the class mentioned in clause (d) of sub-section (1) of section 21 and the mortgage has been satisfied or the amount due has been deposited in Court ;

* * * * *

They also refer to Schedule II of the Abolition Act which lays down that a suit for ejectment of an *asami* must go before an Assistant Collector (First Class). They contend, therefore, that the proceedings before the Munsif were incompetent after 1st July, 1952 and no decree could be passed in favour of the representatives of a mortgagor.

The Zamindari Abolition Act came into force with effect from 1st July, 1952. It has undergone numerous amendments and it is somewhat difficult to find out at any given moment of time what the state of law exactly was, because most of the amending Acts are made partly retrospective and partly not and considerable time is spent in trying to ascertain which part of the original Act survives and to what extent. We are concerned with a number of sections which have undergone changes

again and again and we shall now attempt to examine what the position *vis-a-vis* the suit pending before the Munsif was, as a result of the enacting of the Abolition Act and its numerous amendments.

This suit was filed on 27th May, 1952 when the Abolition Act was not on the statute book. When the Abolition Act was passed it did not repeal the U.P. Agriculturist Relief Act. Both the Acts, therefore, continued on the statute book till 12th July, 1953. On that date Act XVI of 1953 was passed. Section 67 of that Act repealed the U.P. Agriculturist Relief Act. While repealing the Act it was not stated whether the repeal was to operate retrospectively or not but by section 1 (2) the amending Act itself was deemed to have come into force from the first day of July, 1952, that is to say, simultaneously with the Abolition Act. It may, therefore, be assumed that the U.P. Agriculturist Relief Act was also repealed retrospectively from 1st July, 1952. The question is : whether the right of the plaintiff to continue the suit under the old law was in any way impaired. Section 6 of the U.P. General Clauses Act lays down the effect of repeal and it is stated there as follows :—

"6. *Effect of repeal.*—

Where any Uttar Pradesh Act repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—

* * * * *

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed ; or

* * * * *

(e) affect any remedy, or any investigation or legal proceeding commenced before the repealing Act shall have come into operation in respect of any such right, privilege, obligation, liability, penalty forfeiture or punishment as aforesaid ;

and any such remedy may be enforced and any such investigation or legal proceedings may be continued and concluded; and any such penalty, forfeiture or punishment imposed as if the repealing Act had not been passed."

The question is whether a different intention appears in either the Abolition Act or the amending Act XVI of 1953, for otherwise the old proceeding could continue before the Munsif. There is nothing in the Abolition Act which takes away the right of suit in respect of a pending action. If there be any doubt, it is removed when we consider that the U.P. Agriculturist Relief Act was repealed retrospectively from 1st July, 1952 only and it is not, therefore, possible to give the repeal further retrospectivity so as to affect a suit pending from before that date. The jurisdiction of the Assistant Collector was itself created from 1st July, 1952 and there is no provision in the Abolition Act that pending cases were to stand transferred to the Assistant Collector for disposal. Such provisions are commonly found in a statute which takes away the jurisdiction of one Court and confers it on another. From these two circumstances it is to be inferred that if there is at all any expression of intention, it is to keep section 6 of the General Clauses Act applicable to pending litigation. The doubt, if any be left, is further removed if we consider a later amending Act, namely, Amending Act XVIII of 1956. By that Act Schedule II, which created the jurisdiction of the Assistant Collector in suits for ejectment of *asamis* was replaced by another Schedule. The entry relating to suits for ejectment of *asamis*, however, remained the same. But section 23 of the amending Act of 1956 created a special saving which reads as follows :—

"23. *Saving.*—

(i) Any amendment made by this Act shall not effect the validity, invalidity, effect or consequence of anything already done or suffered, or any right, title obligation or liability already acquired, accrued or incurred or any jurisdiction already exercised, and any proceeding instituted or commenced before any Court or authority prior to the commencement of this Act shall, notwithstanding any amendment herein made, continue to be heard and decided by such Court or authority.

(ii) An appeal, review or revision from any suit or proceeding instituted or commenced before any Court or authority prior to the commencement of this Act shall, notwithstanding any amendment

herein made, lie to the Court or authority to which it would have laid if instituted or commenced before the said commencement."

The addition of this section clearly shows that by the conferral of the jurisdiction upon the Assistant Collector it was not intended to upset litigation pending before appropriate authorities when the Abolition Act came into force. Section 23 in terms must apply to the present case, because if it had remained pending before the Munsif till 1956, it is clear, the jurisdiction of the Munsif would not have been ousted. Although it was not pending before the Munsif it was pending before the appellate Court when the 1956 amendment Act was passed. It follows, therefore, that to such a suit the provisions of Schedule II read with section 200 of the Abolition Act cannot be applied because the Legislature has in 1956 said expressly what was implicit before, namely, that pending actions would be governed by the old law as if the new law had not been passed. In our judgment, therefore, the proceedings before the Munsif were with jurisdiction because they were not affected by the passing of the Abolition Act or the amending Act, 1953, regard being had to the provisions of section 6 of the U.P. General Clauses Act in the first instance and more so in view of the provisions of section 23 of the amending Act, 1956 which came before the proceedings between the parties had finally terminated. The appeal must, therefore, fail. It will be dismissed with costs.

V.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, J. C. SHAH AND S. M. SIKRI, JJ.

The State of Gujarat

.. *Appellant**

v.

M/s. Ananta Mills, Ltd.

.. *Respondent.*

Bombay Sales Tax (Exemption, Set-off and Composition) Rules (1954), Rules 6 (ii) and 12 (1)—Scope—Assessee, manufacturer of cotton textiles, purchasing unginmed cotton from unregistered dealers—Paying purchase tax thereon—Unginned cotton ginned and used in manufacture of cotton textiles—Cotton seeds sold—Assessee if entitled to refund, under rule 12 (1), of purchase tax paid.

Where the assessee, a manufacturer of cotton textiles, purchased during the relevant assessment year, unginmed cotton from unregistered dealers and paid purchase tax thereon under section 10 (a) of the Bombay Sales Tax Act, 1953 and the unginmed cotton was ginned and used by the assessee in the manufacture of cotton textiles while the cotton seeds were sold ;

Held, the assessee was entitled, under rule 12(1) of the Bombay Sales Tax (Exemption, Set-off and Composition) Rules, 1954, (shortly the Rules), to a refund of the purchase tax paid by it.

No doubt the purchase of unginmed cotton by the assessee could not be said to have been intended for use in the production of cotton seeds for sale within the meaning of rule 6 (ii). But such intention at the time of the purchase is irrelevant for the purpose of rule 12. In rule 6 (ii) intention was relevant because the purchasing dealer had to furnish to the selling dealer a certificate declaring that the goods sold to him were intended to be used by him for producing any of the goods falling under the corresponding entry in column 2 of the Schedule to the Rules. But when the assessee in the instant case paid the purchase tax on unginmed cotton he paid it because he purchased the same from persons who were not registered dealers and there was no question of furnishing any certificate at that stage. What is necessary to obtain a refund under rule 12 is that goods specified in column 1 of the Schedule to the Rules should have been actually used for the purpose specified *viz.*, the production of any of the goods falling under the corresponding entry in column 2 of the said Schedule for sale. The words "for sale" must, of course, be given effect to so that if any of these goods are produced but not sold rule 12 will not apply.

Appeal by Special Leave from the Judgment and Order, dated the 10th December, 1962, of the Gujarat High Court in Sales Tax Reference No. 8 of 1961.

R. Ganapathy Iyer and B. R. G. K. Achar, Advocates, for Appellant.

I. N. Shroff, Advocate, for Respondent.

The Judgment of the Court was delivered by

Sikri, J.—This appeal by Special Leave is directed against the judgment of the Gujarat High Court in a Sales Tax Reference made to it by the Gujarat Sales Tax Tribunal. Two questions were referred by the said Tribunal to the High Court :

“1. Whether in the facts and circumstances of the case, the purchase of the raw cotton by the applicant Mill could be said to have been intended for use in the production of cotton seeds for sale within the meaning of clause (ii) of rule 6 of the Bombay Sales Tax (Exemption, Set-off and Composition) Rules, 1954.

2. Whether the applicant Mill is entitled under rule 12 (1) to a refund of the purchase tax paid by it.”

The facts set out in the Statement of The Case by the Tribunal are briefly as follows: The respondent is a manufacturer of cotton textiles; particularly of coarse and medium variety cloth. During the assessment period from 1st April, 1955 to 31st March, 1956, it purchased unginned cotton worth Rs. 5,93,266 from unregistered dealers and paid purchase tax of Rs. 5,932 under section 10 (a) of the Bombay Sales Tax Act, 1953. The cotton was ginned and pressed by the respondent, the ginned cotton was used in the manufacture of cotton textiles while the cotton seeds were sold by it. During the course of assessment proceedings the respondent applied for refund of purchase tax paid on the unginned cotton under the Bombay Sales Tax (Exemption, Set-off and Composition) Rules, 1954, (hereinafter referred to as the Rules). The Sales Tax Officer refused to allow any refund on the ground that the conditions of rule 12 (1) read with rule 6 (ii) of the Rules had not been fulfilled. The Assistant Collector of Sales Tax on appeal confirmed the order of the Sales Tax Officer on the ground that

“rule 6 (ii) is not applicable when subsidiary or incidental product alone is sold and the main product is used in the manufacture of other goods. Looking at the wording of the aforesaid Rule, all the products of the unprocessed goods should be sold.”

The respondent filed a revision before the Deputy Commissioner of Sales Tax, who also upheld the order of the Sales Tax Officer. The respondent then filed a revision before the Gujarat Sales Tax Tribunal. The Tribunal rejected the revision on the ground that

“the purpose underlying the applicant's purchases was primarily the production of ginned cotton for manufacture. The cotton seeds which form the bye-product of the ginning process would no doubt have to be sold because the Mill has no use for them. But that does not mean that the purpose for which unginned cotton was purchased was the sale of cotton seeds. It is not reasonable to suppose that a textile mill purchases unginned cotton for the purpose of selling the cotton seeds.”

At the instance of the respondent, as already stated the Tribunal referred the case to the High Court. The High Court answered Question No. 2 in the affirmative, but did not answer Question No. 1 on the ground that the answer to the question was not relevant for the purpose of determining the matter in controversy.

Mr. Ganapathy Iyer, the learned Counsel for the appellant, contends before us that the Sales Tax authorities were right in refusing to allow a refund to the respondent and that the High Court erred in answering the second question in favour of the respondent. In order to appreciate the contentions of the parties it is necessary to set out rules 6 and 12 and the Schedule to the Rules:

“6. *Glasses of sales on which general sales tax shall not be payable.*—The general sales tax leviable under section 9 shall not be payable in respect of the following classes of sales :—

(i) * * * * *

(ii) Sales of any goods falling under any entry specified in column 1 of the Schedule hereto to a dealer who holds a licence under section 12 who furnishes to the selling dealer a certificate in Form (4) declaring that the goods sold to him are intended to be used by him in producing any goods falling under the corresponding entry in column 2 of the said Schedule for sale.

SCHEDULE.

Goods from which the goods specified in column 2
are produced

Goods produced

1

2

1. Cotton in pod : unginned or unpressed
cotton.

Unginned cotton : ginned or pressed cotton :
cotton seeds.

12. Refund and remission of purchase tax in certain cases.—

(1) Where a dealer who has purchased any goods specified in clauses (i) or (ii) of rule 6 shows to the satisfaction of the Collector that they have been used by him for the purpose specified in the said clause, the Collector shall on application for refund made by the dealer in the manner specified in rule 25 of the Bombay Sales Tax (Procedure) Rules, 1954, refund to such dealer the amount of purchase tax paid by him in respect of such purchase ; or where the amount of purchase tax payable under clause (a) of section 10 in respect of such purchase has not yet been paid, the Collector shall by order remit the amount so payable.”

Mr. Ganapathy Iyer contends that when rule 12 speaks of the purpose specified in clause (ii) of rule 6, it means the purpose of “ producing any goods falling under the corresponding entry in column 2 of the said Schedule for sale”. In other words, he says that the purpose must be of producing unginned cotton, ginned or pressed cotton or cotton seeds for sale, and if any of these goods are produced but not sold then rule 12 does not apply.

Mr. Shroff, on the other hand, contends that the words “ purpose specified in the said clause ” only mean the purpose of producing any goods falling under the corresponding entry in column 2 of the Schedule, and he wants us to omit from consideration the words “ for sale”. We agree with Mr. Ganapathy Iyer that the purpose must be the purpose of producing goods—unginned cotton, ginned or pressed cotton, cotton seeds—for sale, and the words “ for sale ” must be given effect to.

But even if this contention of Mr. Ganapathy Iyer is accepted, the respondent would still in our opinion, be entitled to refund under rule 12 (1). Rule 6 speaks of the intention at the time of the purchase, but rule 12 does not incorporate that intention by referring to the purpose specified in clause 6 (ii). The intention at the time of the purchase is irrelevant for the purpose of rule 12. In rule 6 (ii) intention was relevant because the purchasing dealer had to furnish to the selling dealer a certificate in Form (4) declaring that the goods sold to him were intended to be used by him for producing any of the goods falling under the corresponding entry in column 2 of the said Schedule for sale. But when the respondent paid the purchase tax on unginned cotton under section 10 (a) of the Act, he paid it because he purchased the same from persons who were not registered dealers, and there was no question of furnishing any certificate at that stage. As the High Court observed, “ what is necessary is that goods should have been actually used for the purpose specified viz., the production of any of the goods aforementioned for sale”. These conditions have been satisfied in this case because unginned cotton was used for the purpose of producing one of the goods specified in column 2, namely, cotton seeds. Consequently, the respondent is entitled to a refund under rule 12 and the High Court was right in answering the second question in the affirmative. We also agree with the High Court that in view of its answer to Question No. 2 it is not necessary to answer Question No. 1.

In the result the appeal fails and is dismissed with costs here and in the High Court.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, M. Hidayatullah and V. Ramaswami, JJ.

Dr. Jagjit Singh

.. Appellant*

v.

Giani Kartar Singh and others

.. Respondents.

Constitution of India (1950), Article 136—Election appeals brought to Supreme Court under—Interference with findings of facts recorded by High Court—Practice.

Representation of the People Act (XLIII of 1951), section 123 (4)—Scope—Allegation of corrupt practice against returned candidate—Strict proof necessary—Corrupt practice mentioned in section 123 (4)—Necessary ingredients—Onus of proof.

Civil Procedure Code (V of 1908), Order 8, rule 5—Strict rule of pleadings prescribed by—If applies to election proceedings.

Representation of the People Act (XLIII of 1951), sections 83 (1) (a) and 92—Application for inspection of ballot boxes—When can be allowed by Election Tribunal.

It is well settled that the jurisdiction of the High Court in dealing with an election appeal under section 116-A of the Representation of the People Act is very wide. It is open to the High Court to re-appreciate the evidence and consider the propriety, correctness or legality of the findings recorded by the Election Tribunal in its order under appeal. Naturally, as a Court of appeal, the High Court would not interfere with the findings of fact recorded by the Tribunal which are based merely on appreciation of oral evidence. But that is not to say that the High Court cannot so interfere if it comes to the conclusion that the impugned finding is erroneous and deserves to be reversed. When the matter comes to the Supreme Court under Article 136 of the Constitution of India, against the appellate decision of the High Court, the Supreme Court generally does not interfere with questions of fact. Ordinarily, the findings of fact recorded by the High Court in dealing with an appeal under section 116-A of the Representation of the People Act are not disturbed, unless there are strong and compelling reasons to do so. The position becomes still more difficult for the appellant where the findings of fact recorded by the High Court happen to confirm similar findings recorded by the Tribunal.

The nature of the enquiry would be not whether the Supreme Court would necessarily have come to the same conclusion as the High Court has done, but whether the conclusion of the High Court is so erroneous that the Supreme Court must interfere with it. After all, in dealing with questions of this kind, the High Court has to take into account the oral as well as documentary evidence bearing on the points and other relevant and material circumstances. If, after carefully considering all such evidence, the High Court comes to a definite conclusion, ordinarily the Supreme Court would not feel inclined to interfere with such a conclusion after appreciating the relevant evidence itself.

When an Election Tribunal deals with allegations about the commission of corrupt practice by a returned candidate, the charges framed are in the nature of quasi-criminal charges. The proof of the charge has a double consequence ; the election of the returned candidate is set aside, and he incurs subsequent disqualification. Therefore, when a charge of this kind is framed, it has to be proved satisfactorily.

Section 123 (4) of the Representation of the People Act provides, *inter alia*, that the publication by a candidate of any statement which is false and which he either believes to be false or does not believe to be true, in relation to the personal character or in relation to the candidature of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's election, is a corrupt practice. The onus to prove the essential ingredients prescribed by the said sub-section is on the election petitioner. He has to show that the impugned statement has been published by the candidate or his agent or by any other person with the consent of the candidate or his agent. He has further to show that the impugned statement is false ; that the candidate either believed that the said statement was false or did not believe it to be true, and that the statement is in relation to the personal character or conduct of the candidate or his candidature.

The policy underlying section 123 (4) is that in the matter of elections, the public and political character of a candidate is open to scrutiny and can be severely criticised by his opponents, but not so his private or personal character. Though it is not easy to lay down any general considerations which would help the determination of the question whether the false statement impinges on the personal character, in actual practice it may not be very difficult to decide this question. It would be inexpedient and undesirable to lay down any general principle in that behalf.

An allegation against a candidate that among those who drink, his rank was very high or that he trimmed his beard contrary to Sikh religion to which he belonged would be an allegation relating to personal character, whereas an allegation that he falsely claimed to be the Chief Minister's man so that the Police was after him or that he is an unprincipled "*chhokra*" would have relation to the public character of the candidate concerned.

The strict rule of pleadings prescribed by Order 8, rule 5 of the Civil Procedure Code does not apply, with all its rigour, to election proceedings. It is true that section 90 of the Representation of the People Act provides that subject to the provisions of that Act and of any rules made thereunder, every election petition shall be tried by the Tribunal, *as nearly as may be*, in accordance with the procedure applicable under the Civil Procedure Code to the trial of suits. This provision itself emphasises the fact that the whole of the Civil Procedure Code is not fully applicable. Thus, an allegation of corrupt practice prescribed by section 123 (4), made against a returned candidate in an election petition, cannot be held to be proved merely on the ground that no specific denial has been made by the returned candidate in his written statement in that behalf.

Besides, it is plain that there is a proviso to Order 8, rule 5 of the Civil Procedure Code which provides that even if a fact can be deemed to be admitted by virtue of the said rule, it may nevertheless be proved otherwise than by such admission. This clearly shows that even in civil proceedings, it is open to the Court to exercise its discretion and require a party to prove a fact even though an admission of the fact by the opponent can be inferred by the strict application of Order 8, rule 5.

In view of section 92 of the Representation of the People Act, the Election Tribunal can, in a proper case, order the inspection of ballot boxes and may proceed to examine the objections raised by the parties in relation to the improper acceptance or rejection of the voting papers. But in exercising this power, the Tribunal has to bear in mind certain important considerations. Section 83 (1) (a) requires that an election petition shall contain a concise statement of the material facts on which the petitioner relies and in every case where a prayer is made by a petitioner for the inspection of the ballot boxes, the Tribunal must enquire whether the application made by the petitioner in that behalf contains a concise statement of the material facts on which he relies. Vague or general allegations that valid votes were improperly rejected or invalid votes were improperly accepted would not be sufficient. The application for inspection of ballot boxes must give material facts which would enable the Tribunal to consider whether in the interests of justice the ballot boxes should be inspected or not. In dealing with this question the importance of the secrecy of the ballot papers cannot be ignored and it is always to be borne in mind that the statutory rules (Conduct of Election Rules, 1961) provide adequate safeguards for the examination of the validity or invalidity of votes and for their proper counting. It may be that in some cases, the ends of justice would make it necessary for the Tribunal to allow a party to inspect the ballot boxes; but in considering the requirements of justice care must be taken to see that election petitioners do not get a chance to make a roving or fishing enquiry in the ballot boxes so as to justify their claim that the returned candidate's election is void. No hard and fast rule can be laid down in this matter; indeed to attempt to lay down such a rule would be inexpedient.

In the instant case the High Court was right in coming to the conclusion that the appellant had failed to make out a case for the inspection of ballot boxes.

Appeal from the Judgment and Order, dated the 29th May, 1964, of the Punjab High Court in F.A.O. No. 3-E of 1964.

R. K. Gang and *Shamsher Singh Bedi*, Advocates, and *M. K. Ramamurthi*, *S. G. Agarwal* and *D. P. Singh*, Advocates of *M/s. Ramamurthi & Co.*, for Appellant.

Purshottam Trikumdas, Senior Advocate (*Jasbir Singh*, *B. S. Dhillon*, *Yogeshwar Prasad*, *M. Veerappa* and *Hardev Singh*, Advocates, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

Gajendragadkar, C.J.—This appeal has been brought to this Court by the appellant, Dr. Jagjit Singh, on a certificate granted to him by the Punjab High Court. It arises from an Election Petition filed by him on 10th April, 1962, before the Election Tribunal (II), Chandigarh (No. 99 of 1962) against the five respondents. These respondents are : Giani Kartar Singh, Shiv Singh, Channan Ram, Om Prakash and Bhagat Singh respectively. The appellant contested the election to the Punjab Legislative Assembly from the Dasuya Constituency at the last General Election in the beginning of 1962. The result of this election was declared on 25th February, 1962, when respondent No. 1, Giani Kartar Singh, was declared to have been duly elected. The appellant and respondent No. 1 had secured 22,406 and 22,803 votes respectively; and so, it is clear that respondent No. 1 had a very narrow margin over the appellant. The other respondents appeared to have played no significant part in the election, because the votes they secured were 948, 682, 240 and 756 respectively. After the result of the election was announced, the appellant filed an election petition under the relevant provisions of the Representation of the People Act, 1951 (XLIII of 1951) (hereinafter called "the Act"). By his petition, the appellant claimed a declaration that the election of respondent No. 1 was void and that he had in fact been duly elected at the said election. The proceedings before the Tribunal were lengthy and protracted and the dispute between the parties appears to have been fought with great bitterness and heat. The appellant made several allegations against respondent No. 1 and urged on the strength of the said allegations that his election was void. One of the prayers made by the appellant in his election petition was that for the reasons which he had indicated therein, he was entitled to have an inspection of the ballot boxes and a recount made of the votes cast in favour of the respective parties. The Tribunal upheld his plea and allowed inspection of the ballot boxes. As a result of the recount made by the Tribunal, the Tribunal came to the conclusion that the appellant be declared to have been elected at the said election.

At the trial, the Tribunal initially raised 14 issues ; some of them were in the nature of preliminary issues, while others had reference to the merits of the controversy between the parties. On the 24th August, 1962, on a request made by respondent No. 1, two more issues were added, and that made the number of issues 16. Thereafter, on the 3rd September, 1962, the Tribunal added three more issues. In consequence, 19 issues came to be tried by the Tribunal.

The decision of the Tribunal which was in favour of the appellant, however, rested on three findings. It held that respondent No. 1 had committed the corrupt practice of bribery by offering and giving Rs. 1,000 to Tapasvi Gir with the object of inducing him to withdraw from being a candidate at the election, and by offering and giving Rs. 2,000 at Safdarpore to Balwant Singh and others with the object of inducing the electors in that village to vote for him at the election. These two findings would show that respondent No. 1 had committed corrupt practices as defined by section 123 (1) (A) (a) and (b) of the Act. The Tribunal further found that the result of the election in so far as it concerned the returned candidate had been materially affected by the improper reception of votes in his favour which were void and by the improper rejection of valid votes polled in favour of the appellant. On a proper re-counting, the Tribunal came to the conclusion that respondent No. 1 had received 22,412 votes, and the appellant was found to have received 22,491 votes. This conclusion of the Tribunal was recorded under section 100 (1) (d) (iv) of the Act. In the result, the Tribunal allowed the election petition, declared the election of respondent No. 1 to be void, and gave the appellant a declaration that he had been duly elected to the Punjab Legislative Assembly from the Dasuya Constituency of Hoshiarpur District. This decision of the Tribunal was pronounced on the 7th April, 1964.

Against this decision, respondent No. 1 preferred an appeal before the Punjab High Court. Before the High Court respondent No. 1 challenged the correctness of the findings which had been recorded against him by the Tribunal. The appel-

lant supported the said findings and also attempted to support the final conclusion of the Tribunal on the additional ground that the Tribunal was in error in recording findings against him on two issues. These two issues arose from the case made out by the appellant that respondent No. 1 had, in the course of his election, exceeded the amount of Rs. 7,000 which is the permissible expenditure under the law. According to the appellant, respondent No. 1 had in fact spent Rs. 16,340. The Tribunal had rejected this case, and the appellant urged before the High Court that the decision of the Tribunal on this issue was wrong. Similarly, the appellant had urged before the Tribunal that respondent No. 1 had paid by way of bribe Rs. 1,000 to Chanan Ram, respondent No. 3, who was a contesting candidate at the election; and the Tribunal has found that this story had not been satisfactorily proved. The appellant argued before the High Court that even this finding was wrong.

That is how the High Court was called upon to consider the correctness of the findings recorded by the Tribunal against respondent No. 1, and also to consider whether the appellant was right in contending that the findings recorded by the Tribunal in favour of respondent No. 1 on two issues were justified. The two learned Judges of the High Court who heard this appeal have delivered separate, but concurring, judgments dealing with the points which had been conveniently divided between them for elaborate treatment and discussion. In the result, the High Court has held that the findings recorded by the Tribunal on two issues in favour of respondent No. 1 were justified, whereas the findings recorded by it in favour of the appellant and against respondent No. 1 were not justified. The appeal preferred by respondent No. 1 was accordingly allowed, and the election petition filed by the appellant was ordered to be dismissed.

As we have already indicated, the contest between the parties in the present proceedings has been very bitter, and elaborate evidence has been led by both of them in regard to the several issues which arose for decision. The paper-books which have been prepared in this appeal for our use extend over nearly 1,700 printed pages, the judgment of the Tribunal spreads over 172 pages, whereas the two judgments delivered by the learned Judges of the High Court occupy about 100 pages. Even so, as often happens, the controversy between the parties before this Court has been limited to a few points which can be legitimately raised under Article 136 of the Constitution.

It is relevant at the outset to indicate briefly the approach which this Court generally adopts in dealing with election appeals brought before it under Article 136. It is well settled that the jurisdiction of the High Court in dealing with an election appeal under section 116-A of the Act is very wide. It is open to the High Court to re-appreciate the evidence and consider the propriety, correctness or legality of the findings recorded by the Tribunal in its order under appeal. Naturally, as a Court of Appeal, the High Court would not interfere with the findings of fact recorded by the Tribunal which are based merely on appreciation of oral evidence. But that is not to say that the High Court cannot so interfere if it comes to the conclusion that the impugned finding is erroneous and deserves to be reversed. When the matter comes to this Court under Article 136 against the appellate decision of the High Court, this Court generally does not interfere with questions of fact. Ordinarily, the findings of fact recorded by the High Court in dealing with an appeal under section 116-A of the Act are not disturbed, unless there are strong and compelling reasons to do so. The position becomes still more difficult for the appellant where the findings of fact recorded by the High Court happen to confirm similar findings recorded by the Tribunal. That is why the limits of the controversy in election appeals brought to this Court under Article 136 naturally become very narrow.

In the present case, on two points the High Court and the Tribunal have made concurrent findings. The first is in relation to the expenses alleged to have been incurred by respondent No. 1 in excess of the permissible limit of Rs. 7,000; and the other is in relation to the bribe alleged to have been paid by respondent No. 1 to Chanan Ram, respondent No. 3. Both the Tribunal and the High Court have elaborately considered the oral evidence led by the parties and have examined the

probabilities in the case and the conduct of the parties respectively. It appears from these findings that neither the High Court nor the Tribunal was satisfied that it would be safe to accept the evidence adduced by the appellant and hold that respondent No. 1 was guilty of the charge of excessive expenditure or of offering a bribe to Chanan Ram. That being so, we have not allowed, Mr. Garg for the appellant to raise these points before us, because we thought that we would not be justified in examining the evidence ourselves to consider the propriety or correctness of the said findings.

That takes us to the two allegations of bribe-giving on which the High Court has reversed the conclusions of the Tribunal. Even in considering Mr. Garg's contention that the findings recorded by the High Court on these two points are erroneous, our approach naturally, is to enquire whether Mr. Garg is able to show any serious error in the approach adopted by the High Court or in its appreciation of evidence which would justify our interference. In considering this aspect of the matter, the nature of the enquiry would be not whether this Court would necessarily have come to the same conclusion as the High Court has done, but whether the conclusion of the High Court is so erroneous that this Court must interfere with it. After all, in dealing with questions of this kind, the High Court has to take into account the oral as well as the documentary evidence bearing on the points and the other relevant and material circumstances. If, after carefully considering all such evidence, the High Court comes to a definite conclusion, ordinarily this Court would not feel inclined to interfere with such a conclusion after appreciating the relevant evidence itself. That is the approach which we propose to adopt in dealing with the contentions raised by Mr. Garg in the present appeal.

The first charge of bribe made by the appellant against respondent No. 1 is that respondent No. 1 persuaded Tapasvi Gir to withdraw his candidature from the election. It was his case that Tapasvi Gir is an Ad-Dharmi and an influential member of his community ; and he urged that Tapasvi Gir had been adopted as an official candidate by the Republican Party. The appellant specifically averred that respondent No. 1 had offered to Tapasvi Gir Rs. 1,000 with a view to induce him to withdraw from his candidature. In that connection, it was alleged that respondent No. 1 met Tapasvi Gir on the 30th January, 1962, along with Narain Das, a Congress worker, and Lalji Ram, the District Secretary of the Republican Party, and made a formal request that Tapasvi Gir should withdraw. As a result Rs. 1,000 were paid and Tapasvi Gir withdrew his candidature from the election.

In support of this case, the appellant examined Narain Das, P.W. 16; Thakur Das, P.W. 30, and Chanan Ram, P.W. 31, whereas respondent No. 1 examined Lalji Ram, R.W. 14, and Ajit Kumar, R.W. 13. According to Tapasvi Gir, when the bribe of Rs. 1,000 was offered by respondent No. 1, he did not accept the money, but Thakur Das did. It would thus be seen that the decision of this question depends on whether the evidence given by the 3 witnesses whom the appellant examined was to be preferred to the evidence given by the 2 witnesses whom respondent No. 1 examined. The High Court was not prepared to believe the evidence of the appellants' witnesses. It held that Thakur Das appeared to be the tenant of the appellant at the relevant time and in that sense, was not reliable. In regard to Chanan Ram, the High Court thought that part of the evidence given by him was inadmissible ; and with regard to Narain Das, it took the view that he was not a trustworthy witness. On the other hand, the High Court was inclined to take the view that the evidence given by respondent No. 1's witnesses Lalji Kumar and Ajit Kumar was more reliable.

There are two comments which the High Court has made in reversing the conclusion of the Tribunal on this part of the appellant's case. The first comment is that the Tribunal has not given due consideration to the fact that the evidence of Lalji Ram and Ajit Kumar satisfactorily shows that Tapasvi Gir was not adopted by the Republican Party as its own candidate at all ; and the High Court has observed, and we think, rightly, that if Tapasvi Gir had not been duly adopted as an official candidate by the Republican Party, the whole basis of the appellants' case

that he was an important rival and had, therefore, to be persuaded to withdraw from the election, falls to the ground. The evidence to which the High Court has referred in support of its finding that Tapasvi Gir had not been adopted by the Republican Party as its candidate, is very satisfactory ; and so, the criticism made by the High Court against the Tribunal in that behalf cannot be said to be unjustified.

The other comment which the High Court has made in regard to the decision of the Tribunal has reference to the criticism made by respondent No. 1 against Narain Das. Narain Das claimed to be a staunch Congress worker of longstanding and presumably to support this claim, he appeared in the witness-box dressed in 'khaddar' clothes which generally constitute the uniform of Congress workers. It was suggested to Narain Das in cross-examination that he had put on 'khaddar' clothes only a day before he appeared in the witness-box to create an impression that he always put on the 'khaddar' uniform of the Congress Party. Dealing with this criticism made by respondent No. 1 against the conduct of Narain Das, the Tribunal has observed in its judgment that the 'khaddar' clothes which Narain Das had worn did not appear to be new. The High Court has pointed out that this observation made by the Tribunal does not appear to be justified, because the Tribunal had not made any note to this effect when the evidence of Narain Das was recorded. The Tribunal delivered its judgment long after the evidence of Narain Das was recorded, and if it wanted to make an observation of this character, it should have made a contemporaneous note to that effect in the record of the proceedings. We cannot see how Mr. Garg can quarrel with the comment thus made by the High Court against the Tribunal's observation. Therefore, we are satisfied that no legitimate or valid grievance can be made by the appellant in regard to the finding recorded by the High Court in respect of the appellant's case that Rs. 1,000 were paid by respondent No. 1 for the withdrawal of Tapasvi Gir from the election.

The next charge of bribery is in relation to the payment of Rs. 2,000 alleged to have been made by respondent No. 1 to Balwant Singh Sarpanch of village Safdar-pore. The appellant's case is that when respondent No. 1 offered Rs. 2,000 to Balwant Singh on the 22nd February, 1962, Balwant Singh was first reluctant to accept that amount ; but respondent No. 1 left the amount with him and it was subsequently credited to the Panchayat funds. The appellant urged that the receipt of this amount was expressly referred to in the Panchayat's resolution passed on the 5th March, 1962. In support of this case, the appellant examined Sansar Singh, P.W. 17, a member of the Panchayat, and Nasib Singh, P.W. 18, a resident of the village. It appears that Balwant Singh was called upon to produce the records of the Panchayat in order to enable the appellant to prove his case. Exhibit P-41 is the proceeding-book in which the resolution of the 5th March, 1962, is recorded. When Balwant Singh produced the said record, two loose sheets of paper were found among the pages of the Cash Book (Exhibit P-42) and they have been admitted and marked as Exhibits P-43 and P-43-A in spite of the objection of respondent No. 1. The appellant relied on these two sheets as well as the resolution. Respondent No. 1 examined Balwant Singh, Sarpanch, R.W. 23, Harnam Singh, the Secretary of the Panchayat, R.W. 20 and Vakil Singh, R.W. 24, a Member of the Panchayat. The High Court has held that the position disclosed by the evidence led by the parties was unsatisfactory and that the matter "is not free from doubt", with the result that the High Court was unable to make a finding that the charge levelled against respondent No. 1 in respect of the payment of Rs. 2,000 to the Panchayat of the village had been brought home to him.

Mr. Garg has strenuously contended that the High Court was in error in recording this finding. He does not dispute the fact that when an Election Tribunal deals with allegations about the commission of corrupt practice by a returned candidate, the charges framed are in the nature of quasi-criminal charges. The proof of the charge has a double consequence ; the election of the returned candidate is set aside, and he incurs subsequent disqualification as well. Therefore, when a charge of this kind is framed against a returned candidate, it has to be proved satisfactorily. It is

true that the High Court itself has observed that the cross-examination of Sansar Singh and Nasib Singh did not disclose any intrinsic infirmity to justify the rejection of their evidence ; but it has also pointed out that there is no reason why the evidence of Balwant Singh, Harnam Singh and Vakil Singh should be disregarded either. Thus, the state of the oral evidence was fairly equally balanced, and the decision of the issue, therefore, depended upon the documentary evidence produced in the proceedings, and it is on the documentary evidence that Mr. Garg has placed considerable reliance.

The resolution passed by the Panchayat on the 5th March, 1962, reads thus:—

“ It was also passed that the Panchayat Safdarpur has got collected a sum of Rs. 3,000 for the school and that the Government should also give a grant of Rs. 3,000 for the school. This grant should be given immediately and should be sent without any loss of time in order that the construction work of the school building may be started. This was passed. It was also resolved that a copy of the resolution be sent to the Block Development Officer with the request that the grant of the school should be sent immediately. ”

Mr. Garg contends that the first part of the resolution clearly indicates that an amount of Rs. 2,000 had been received by the Panchayat from respondent No. 1. It is common ground that at the relevant date, the Panchayat had about Rs. 1,200 cash balance with it ; and the argument is that the said cash balance and the amount of Rs. 2,000 paid by respondent No. 1 represent Rs. 3,000 which is referred to as having been collected by the Panchayat. This argument has not been accepted by the High Court. The High Court took the view that since the object of the resolution plainly was to secure from the Government a matching grant of Rs. 3,000, the recital that Rs. 3,000 had already been collected need not be literally construed. The High Court referred to the fact that about Rs. 2,200 was lying in deposit with the Board which was due to the Panchayat by way of compensation for the acquisition of some land in the village for the construction of a road ; and since the Panchayat was entitled to recover this amount, it might have treated that amount as already received. On the other hand, it is shown by evidence that this amount had not in fact been received on the date of the resolution, and was not received even thereafter before the school building was completed. In dealing with the question as to whether the conclusion of the High Court is right or not, we cannot lose sight of the fact that the object of the resolution was undoubtedly to secure a matching grant from the Government for the construction work of the school buildings ; and so, we are not prepared to hold that the High Court was in error in refusing to treat the first recital in the resolution too literally.

Mr. Garg, however, strenuously contended before us that this conclusion of the High Court is shown to be erroneous by the fact that the construction work was substantially completed between March and July, 1962, and the necessary expenses actually incurred ; and he points out that unless Rs. 2,000 had been actually received by the Panchayat, it would have been impossible for the Panchayat to pay the expenses incurred in the construction of the school building. This aspect of the matter, no doubt, makes the appellant's case arguable ; but the difficulty in accepting the argument lies in the fact that the High Court has made a definite finding that the slips of paper Exhibits P-43 and P-43-A as well as the cash book produced in the proceedings showed that the Panchayat had received considerable amount during the period from its legitimate sources of income. The High Court has found that

“ all that is shown by the entries in the cash book and the abstracts P-43 and P-42-A is that the money spent on the work of construction came from the Panchayat funds available to the Panchayat without either any Rs. 2,000 from Giani Kartar Singh or from the compensation. ”

The High Court has also found that the said document showed that the Panchayat had about Rs. 1,200 in hand in March, 1962 and that at no time had the expenditure on the construction work exceeded the amount available in the Panchayat funds up to July. Therefore, the main argument on which Mr. Garg rested his case before us does not appear to be well-founded. The

evidence shows that the Panchayat had funds at its disposal from which the expenditure involved in the construction of the school building could be, and must be deemed to have been incurred. It is not, therefore, possible to accept the argument that but for the receipt of Rs. 2,000 from respondent No. 1, this expenditure could not have been incurred. That is why we do not think that we would be justified in interfering with the finding of the High Court on this point.

That takes us to the question as to whether respondent No. 1 was guilty of a corrupt practice under section 123 (4) of the Act. The appellant's case is that respondent No. 1 was responsible for the publication of a pamphlet in "Quami Ekta" which made four false allegations in regard to the personal character of the appellant, and he made those allegations believing them to be false, or not believing them to be true. That is how a charge under section 123 (3) was levelled against respondent No. 1 by the appellant. He also urged that by the publication, in Quami Ekta, of certain false reports respondent No. 1 had made false statements in relation to the candidature of the appellant knowing that the said statements were false and not believing them to be true. That, again, is a charge under section 123 (4). The Tribunal and the High Court have made concurrent findings against the appellant on both these points; but Mr. Garg contends that in recording the said findings, they have misdirected themselves in law, and that is why it is necessary to consider the points of law raised by Mr. Garg in this connection:

Section 123 (4) provides, *inter alia*, that the publication by a candidate of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, or in relation to the candidature of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's election, is a corrupt practice. It would be noticed that the onus to prove the essential ingredients prescribed by the said sub-section is on the appellant. He has to show that the impugned statement has been published by the candidate or his agent or by any other person with the consent of the candidate or his election agent. This fact has been proved in the present case in regard to both the statements. The appellant has further to show that the impugned statement is a statement of fact which is false; that respondent No. 1 either believed that the said statement was false, did not believe it to be true; and that the statement is in relation to the personal character or conduct of the candidate or his candidature.

The question as to what allegations can be said to amount to allegations in regard to the personal character of a candidate, as distinguished from his public character, is not always easy to decide on consideration of abstract principles. The policy underlying the present provision is that in the matter of elections, the public and political character of a candidate is open to scrutiny and can be severely criticised by his opponents, but not so his private or personal character. In order that the elections in a democratic country should be freely and fearlessly conducted, considerable latitude has to be given to the respective competing candidates to criticise their opponent's political or socio-economic philosophy or their antecedents and character as public men. That is why even false statements as to the public character of candidates are not brought within the mischief of section 123 (4), because the Legislature thought that in the heat of election it may be permissible for competing parties and candidates to make statements in relation to the public character of their opponents, and even if some of the statements are false, they would not amount to corrupt practice. Having regard to this policy of the statute, it often becomes necessary to examine carefully whether the false statement impinges on the personal character of the candidate concerned. Though it is not easy to lay down any general considerations which would help the determination of this issue in every case, in actual practice it may not be very difficult to decide whether the false statement impinges on the personal character of the candidate or on his public character. It would be inexpedient and undesirable to lay down any general

principle in that behalf [vide *Inder Lal v. Lal Singh*¹; and *T. K. Gangi Reddy v. M. C. Anjaneya Reddy and others*²].

Let us now refer to the statements published in the "Quami Ekta" (Exhibit P-22) which according to the appellant, constitute a corrupt practice under section 123 (4) of the Act. The said statements read as under:—

- "1. that among those who drink, his rank is very high ;
2. that he trimmed his beard which was contrary to the Sikh religion ;
3. that he falsely claimed to be the Chief Minister's man and the C.I.D. Police, therefore, was after him ; and
4. that he was an unprincipled 'chhokra'."

Both the Tribunal and the High Court have held in the present proceedings that the first two statements have relation to the personal character of the appellant, whereas the last two have relation to his public character. We see no reason to differ from this conclusion. Both the Tribunal and the High Court have also held that it is not shown that at the time when the statements were made, respondent No. 1 believed them to be false, or did not think them to be true. It is the correctness of this conclusion which is seriously challenged before us by Mr. Garg.

It appears that a criminal case is pending between the appellant and respondent No. 1 in regard to this pamphlet, and the Tribunal thought that having regard to the fact that the matter had gone before a criminal Court, it would be better if it did not make a specific and definite finding as to the falsity of the statements made in the pamphlet. Even so, the Tribunal considered the oral evidence led by the parties and came to the conclusion which we have already mentioned. The High Court has adopted the same approach and has concurred with the findings of the Tribunal. It appears that the oral evidence adduced by respondent No. 1 shows that the appellant was in the habit of taking drinks, and that he had trimmed his beard which is contrary to the Sikh religion. Having considered the said evidence, a finding has been made in favour of respondent No. 1 on the lines just indicated.

Mr. Garg, however, contends that in reaching this conclusion, both the Tribunal and the High Court have failed to take into account one important fact arising from the pleadings of the parties. He argues that in the petition filed by the appellant, he had specifically, clearly, and definitely averred that the publication of the pamphlet amounted to a corrupt practice on the part of respondent No. 1; and he points out that though respondent No. 1 denied that he had anything to do with the publication of the pamphlet, he did not traverse the plea made by the appellant that the impugned statements were false, that they concerned his personal character, and that they were believed to be false by respondent No. 1 and not believed to be true by him. Mr. Garg's case is that if respondent No. 1 did not specifically controvert the material allegations made by the appellant in his petition in respect of this charge, it was not open to the Tribunal to allow respondent No. 1 to lead evidence in rebuttal; and both the Tribunal and the High Court should have ignored that evidence and should have given full effect to the fact that respondent No. 1 had not denied the essential ingredients of the charge which had been specifically pleaded by the appellant in his election petition. In substance, the argument is based on the provisions of Order 8, rule 5 of the Code of Civil Procedure. Mr. Garg contends that the procedure prescribed by the Code applies to election proceedings; and so he relies on the provisions of Order 8, rule 5 in support of his argument that the present charge should have been held to be proved against respondent No. 1.

We are not impressed by this argument. In considering the question as to whether the strict rule of pleadings prescribed by Order 8, rule 5 applies to election proceedings with all its rigour, we must bear in mind the fact that the charge like the present is in the nature of a criminal charge and the proceedings in respect of

1. (1962) (Suppl.) 3 S.C.R. 114 : (1963) 2 S.C.J. 108 : A.I.R. 1962 S.C. 1156.

2. (1961) 22 E.L.R. 261.

its trial partake of the character of quasi-criminal proceedings. It is true that section 90 of the Act provides that subject to the provisions of this Act and of any Rules made thereunder, every election petition shall be tried by the Tribunal, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908, to the trial of suits. This provision itself emphasises the fact that the whole of the Civil Procedure Code, is not fully applicable. What the section provides is that the proceedings should be tried "as nearly as may be" according to the Code of Civil Procedure. If the contention raised by Mr. Garg is accepted at its face value, it may logically lead to this consequence that if a returned candidate does not controvert the allegations made by the petitioner in his election petition alleging the commission of a corrupt practice by the returned candidate, a finding would have to be made in favour of the petitioner without any evidence at all. In other words, the question is: can a corrupt practice prescribed by section 123 (4) of the Act be held to be proved merely on the ground that no specific denial has been made by the returned candidate in his written statement in that behalf? In considering this point, we cannot overlook the fact that the onus to prove the essential ingredients of section 123 (4) is on the petitioner, and so, it would be for him to prove that the statement is false, and that the other requirements of the section are satisfied. Having regard to the nature of the corrupt practice which is prescribed by section 123 (4), we are not prepared to hold that the strict rule of pleadings prescribed by Order 8, rule 5 of the Code can be blindly invoked in election proceedings of this type.

Besides, it is plain that there is a proviso to Order 8, rule 5 which, in terms, confers jurisdiction on the Court that even if a fact can be deemed to be admitted by virtue of the said rule, it may nevertheless be proved otherwise than by such admission. This proviso clearly shows that even in civil proceedings to which the Code applies, it is open to the Court to exercise its discretion and require a party to prove a fact even though an admission of the said fact by the opponent can be inferred by the strict application of Order 8, rule 5; and that is precisely what the Tribunal has done in the present case. When this question was argued before the Tribunal, it examined the arguments urged by both the parties and held that in the interests of justice, it was necessary to allow respondent No. 1 to lead evidence in rebuttal; and it is in the light of the evidence led by respondent No. 1 that the Tribunal made its finding on this issue against the appellant and the said finding has been confirmed by the High Court. Therefore, we do not think that the points of law raised by Mr. Garg in respect of this charge really assist him to challenge effectively the correctness of the findings recorded by the Courts below.

Then as to the charge that the publication of certain statements and posters by respondent No. 1 amounted to a corrupt practice under the latter part of section 123 (4), the position is not any better for the appellant. It is true that the publication of a false statement in relation to the candidature of the appellant would amount to a corrupt practice if the other ingredients of the said provision are satisfied. The Tribunal and the High Court have held that the false statement on which the argument is founded, does not have any reference to the candidature of the appellant at all, and in our opinion, this conclusion is right. Let us briefly indicate why?

The poster in question reads thus:—

"IMPORTANT ANNOUNCEMENT OF

Shiromani Akali Dal, Amritsar

Vote for Shiv Singh Jhawan

Dear Khalsa Ji

It is for your information that the Shiromani Akali Dal has nominated Shiv Singhi Jhawan as its candidate. As the letter could not reach in time, therefore he has been allotted the symbol of "TREE". We appeal to all the Akali workers and the Sangat that they should support him and make him successful. S. Shiv Singh is the only tried Sewak of the Panth. He has rendered great services during the Akali Morcha. Even now there is a warrant of arrest against him. The Sikh Masses should not labour under misunderstanding and they should help in flying the Panthic Flag high.

Panth De Dass

Fatch Singh Sant,
Vice-President.

Tara Singh Master,
President.

SHIROMANI AKALI DAL, AMRITSAR

Chakrala Printing Press, Urmur".

No evidence has been brought on the record to show that either Fatch Singh Sant or Tara Singh Master signed this document. In fact, Master Tara Singh who was the President of Shiromani Akali Dal has denied that he or Sant Fatch Singh had signed it; and so, in relation to the said two signatures, the poster is a false document. It is also proved that respondent No. 1 is responsible for the publication of this document. But the question which arises for our decision is: does this document have relation to the candidature of the appellant? What this document purports to do is to ask the Akali workers and the Sangat to support the candidature of Shiv Singh. The argument is that since the appellant had received the support of the Akali Dal party, this poster was intended to weaken the appellant's position by making a false representation to the followers of the Akali Dal that Shiv Singh deserved their support, because he was the only tried Sewak of the Panth. It seems to us that the requirement of section 123 (4) is plain and unambiguous. The impugned statement on which a charge under the said provision can rest, must be shown to be false, and must have relation to the candidature of the candidate. Now, this document and the other documents which were similarly published do not make any reference to the candidature of the appellant at all. Besides, it is significant that the appellant had not been adopted by the Akali Dal party as its official candidate, so that if the poster represented to the Akali workers that Shiv Singh deserved their support, it cannot be said even by necessary inference or implication that the candidature of the appellant was referred to; perhaps such an inference could have been drawn if the appellant had been adopted as an official candidate by the Akali Dal party.

On the contrary, the evidence in the case shows that Shiv Singh was intended to be adopted by the Akali Dal party as its official candidate. A telegram Exhibit R-2 was sent by Akali Dal, Amritsar to the Returning Officer requesting him to allot "HAND" which was the symbol of the Akali Dal, to Shiv Singh who was an Akali candidate; but apparently, this telegram was received late and the symbol of 'HAND' could not be allotted to Shiv Singh. The evidence given by S. Ajmer Singh (R.W. 17), Secretary of the Akali Dal, clearly shows that the Akali Dal had nominated Shiv Singh as a candidate and a telegram had been sent to the Returning Officer by Atma Singh, who was the General Secretary, under the authority of Ajmer Singh. Exhibit R-3 shows that Atma Singh and Ajmer Singh had been authorised by the Akali Dal to request the Returning Officer to allot the adopted candidate the symbol chosen by the Party. It may be that ultimately, Akali Dal decided to support the appellant, and not Shiv Singh; but that has no relevance to the point which we are considering under section 123 (4). Reading the impugned poster fairly, it is difficult to accept Mr. Garg's contention that the said poster makes a false statement in relation to the candidature of the appellant. That being so, it is unnecessary to consider whether the other requirements of section 123 (4) in relation to this poster are satisfied or not.

That leaves one more point to consider, and it is related to the order passed by the Tribunal directing the inspection of the ballot boxes and examination of the voting papers cast by the electors in favour of the respective candidates. We have already noticed that the Election Tribunal allowed the appellant to inspect the ballot boxes, examined the objections raised by the appellant in regard to the validity or invalidity of a large number of voting papers, and ultimately counted the votes cast in favour of the appellant and respondent No. 1. The High Court has found that the Tribunal was in error in allowing inspection of the ballot boxes, and it has also held that the finding made by it after examining the objections raised by the appellant, is also not correct. It is unnecessary for us to consider this latter part of the

High Court's conclusion, because, in our opinion, the High Court was right in holding that no case had been made out by the appellant for the inspection of the ballot boxes at all. That being so, it is unnecessary to enquire what would be the result if the objections raised by the appellant are considered and the votes are recounted. So, the narrow question at this stage is: was the Tribunal justified in allowing inspection of the ballot boxes in the present proceedings?

The true legal position in this matter is no longer in doubt. Section 92 of the Act which defines the powers of the Tribunal, in terms, confers on it, by clause (a), the powers which are vested in a Court under the Code of Civil Procedure when trying a suit, *inter alia*, in respect of discovery and inspection. Therefore, in a proper case, the Tribunal can order the inspection of the ballot boxes and may proceed to examine the objections raised by the parties in relation to the improper acceptance or rejection of the voting papers. But in exercising this power, the Tribunal has to bear in mind certain important considerations. Section 83 (1) (a) of the Act requires that an election petition shall contain a concise statement of the material facts on which the petitioner relies; and in every case, where a prayer is made by a petitioner for the inspection of the ballot boxes, the Tribunal must enquire whether the application made by the petitioner in that behalf contains a concise statement of the material facts on which he relies. Vague or general allegations that valid votes were improperly rejected, or invalid votes were improperly accepted, would not serve the purpose which section 83 (1) (a) has in mind. An application made for the inspection of ballot boxes must give material facts which would enable the Tribunal to consider whether in the interests of justice, the ballot boxes should be inspected or not. In dealing with this question, the importance of the secrecy of the ballot papers cannot be ignored, and it is always to be borne in mind that the statutory Rules framed under the Act are intended to provide adequate safeguard for the examination of the validity or invalidity of votes and for their proper counting. It may be that in some cases, the ends of justice would make it necessary for the Tribunal to allow a party to inspect the ballot boxes and consider his objections about the improper acceptance or improper rejection of votes tendered by voters at any given election; but in considering the requirements of justice, care must be taken to see that election petitioners do not get a chance to make a roving or fishing enquiry in the ballot boxes so as to justify their claim that the returned candidate's election is void. We do not propose to lay down any hard and fast rule in this matter; indeed, to attempt to lay down such a rule would be inexpedient and unreasonable.

Whenever an Election Tribunal is called upon to consider this question, it should not ignore the safeguards which have been prescribed by the relevant Rules prescribed in Part V of the Conduct of Elections Rules, 1961. Let us briefly indicate the broad features of these Rules. Under rule 53, candidates, their election agents or counting agents are admitted to the place fixed for counting of votes. Rule 54 emphasises the importance of the maintenance of secrecy of voting. Rule 55 deals with the scrutiny and opening of ballot boxes; before a ballot box is opened at a counting table, the counting agents present at that table shall be allowed to inspect the paper seal or such other seal as might have been affixed thereon and to satisfy themselves that it is intact. The Returning Officer has himself to take care to see that no ballot box has been tampered with. In case any tampering of the ballot boxes is disclosed, the Returning Officer has to take action under rule 58. Rule 56 provides for the scrutiny and rejection of ballot papers. Rule 56 (1) lays down that the ballot papers taken out of each ballot box shall be arranged in convenient bundles and scrutinised. Then objections are raised as specified by sub-rule (2) and are dealt with in accordance with the provisions of other sub-clauses of rule 56 (2). It is thus clear that the scheme of Rule 56 is that every ballot paper can be examined by the counting agent and objections can be raised in respect of it if the election agent feels that a valid objection can be raised. It is after these objections are examined and dealt with according to rule 56 that the stage of counting

votes arrives. Even after the completion of the counting, it is open to a candidate or his election agent to apply in writing to the Returning Officer for a recount of all or any of the ballot papers already counted stating the grounds on which he demands such recount. That is the effect of rule 63 (2). After all this procedure has been gone through, the Returning Officer completes the result sheet in Form 20, and signs it. Once that is done, no application for a recount shall be entertained. We have referred broadly to the scheme of these Rules to emphasise the point that the election petitioner who is a defeated candidate, has ample opportunity to examine the voting papers before they are counted, and in case the objections raised by him or his election agent have been improperly over-ruled, he knows precisely the nature of the objections raised by him and the voting papers to which those objections related. It is in the light of this background that section 83 (1) of the Act has to be applied to the petitions made for inspection of ballot boxes. Such an application must contain a concise statement of the material facts.

This question has been considered by this Court on several occasions. In *Ram Sewak Yadav v. Hussain Kamil Kidwai and others*¹, this Court observed that an order for inspection of ballot papers cannot be granted to support vague pleas made in the petition not supported by material facts or to fish out evidence to support such pleas. The case of the petitioner must be set out with precision supported by averments of material facts. To establish a case so pleaded an order for inspection may undoubtedly, if the interests of justice require, be granted. But a mere allegation that the petitioner suspects or believes that there has been an improper reception, refusal or rejection of votes will not be sufficient to support an order for inspection. The same view has been expressed in *Smt. Dr. Sushila Balraj v. Shri Ardhendu Bhushan and others*², and in *Sitaram Mahto v. Sri Ramanandan Rai and others*³.

Let us then examine whether the appellant's petition contained a concise statement of the material facts on which a claim for inspection of ballot papers can be justified. In the application made by the appellant on the 7th March, 1963, he urged that in the election petition filed by him, it had been averred that a very large number of votes purported to have been cast in favour of the appellant had been improperly rejected, and that has materially affected the result of the election; and he added that there was also an allegation that a large number of votes which were invalid had been improperly accepted in favour of respondent No. 1 which has also materially affected the result of the election. This application further sets out the appellant's version that the Returning Officer disclosed a partisan attitude and the counting and examination of votes was done in a very irregular manner. The appellant pleaded that he had led some evidence regarding the misconduct of the Returning Officer at the time of the counting; and so, a prayer was made that the ballot papers may be allowed to be inspected

"in order to enable the appellant to establish his case both regarding improper rejection and reception of ballot papers and the non-compliance with the rules under the Act on the part of the Returning Officer which have materially affected the result of the election in so far as respondent No. 1 is concerned."

It may be observed that at the time when the application for inspection was made, evidence had already been led before the Tribunal; and Mr. Garg's contention is that the Tribunal, on considering the evidence in the light of the allegations made by the appellant, was satisfied that an inspection should be ordered in the interests of justice; and he argues that the High Court was in error in reversing this order on appeal.

We are not prepared to accept this contention. The order passed by the Tribunal clearly shows that the Tribunal did not apply its mind to the question as to whether sufficient particulars had been mentioned by the appellant in his application for inspection. All that the Tribunal has observed is that a *prima facie* case has been made out for examining the ballot papers; it has also referred to the fact

1. A.I.R. 1964 S.C. 1249.

3. C.A. No. 45 of 1965 decided on 10th February, 1965.

2. C.A. No. 124 of 1963 decided on 18th March, 1964.

that the appellant has in his own statement supported the contention and that the evidence led by him *prima facie* justifies his prayer for inspection of ballot papers. In dealing with this question, the Tribunal should have first enquired whether the application made by the appellant satisfied the requirements of section 83 (1) of the Act; and, in our opinion, on the allegations made, there can be only one answer and that is against the appellant. We have carefully considered the allegations made by the appellant in his election petition as well as those made by him in his application for inspection, and we are satisfied that the said allegations are very vague and general, and the whole object of the appellant in asking for inspection was to make a fishing enquiry with a view to find out some material to support his case that respondent No. 1 had received some invalid votes and that the appellant had been denied some valid votes. Unless an application for inspection of ballot papers makes out a proper case for such inspection, it would not be right for the Tribunal to open the ballot boxes and allow a party to inspect the ballot papers, and examine the validity or invalidity of the ballot papers contained in it. If such a course is adopted, it would inevitably lead to the opening of the ballot boxes almost in every case, and that would plainly be inconsistent with the scheme of the statutory Rules and with the object of keeping the ballot papers secret. That is why we are satisfied that the High Court was right in coming to the conclusion that the appellant had failed to make out a case for the inspection of the ballot boxes in this case.

Before we part with this appeal, we would like to refer to three matters which show that respondent No. 1 did not contest this litigation with clean hands. The Tribunal has referred to the part played by respondent No. 2 Shiv Singh in the present proceedings, and has made a bitter comment about the relation between Shiv Singh and respondent No. 1. The High Court has referred to the sordid story about the part played by Madan Lal in collusion with respondent No. 1 in relation to the evidence which he gave in the present proceedings. Similarly, the part played by respondent No. 1 in assisting the adoption of a somewhat coercive and terrorising attitude in relation to Thakur Das who was a witness for the appellant, has also been criticised by the Tribunal in strong words. While expressing our concurrence with the comments made by the Tribunal and the High Court in regard to these three matters, we wish to express our strong disapproval of the course of conduct adopted by respondent No. 1 in relation to these three matters. We have no doubt that the said conduct of respondent No. 1 is wholly unworthy of the high position which he holds in public life.

The result is, the appeal fails and is dismissed. There would be no order as to costs.

V.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, J. C. SHAH AND S. M. SIKRI, JJ.

The State of Madhya Bharat (now the State of Madhya Pradesh) and others

.. *Appellants**

v.

Hiralal Ji

.. *Respondent.*

* *Madhya Bharat Sales Tax Act (XXX of 1950), Notification No. 58 under the Act, Item No. 39—Purchase by assessee of scrap iron locally and import of iron plates from outside—Sale after conversion into bars, flats, and plates—Exempt from sales tax under the Notification—Distinction between sale of raw materials and goods prepared from such raw materials.*

A comparison of the notifications brings out the distinction between raw materials of iron and steel and the goods prepared from iron and steel; while the former is exempted from tax, the latter is taxed. So long as iron and steel continue to be raw materials, they enjoy the exemption. Scrap iron purchased by the assessee was merely re-rolled into bars, flats and plates, processed for convenience

of sale and to give them attractive and acceptable forms. They did not in the process lose their character as iron and steel so as to lose the exemption from tax.

Appeal by Special Leave from the Judgment and Order, dated the 24th October, 1961, of the Madhya Pradesh High Court in Miscellaneous Petition No. 125 of 1958.

I. N. Shroff, Advocate, for Appellants.

C. B. Agarwala, Senior Advocate (*C. P. Lal*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Subba Rao, J.—This appeal by Special Leave raises the question of the interpretation of Item No. 39 of the Notification No. 58 dated 24th October, 1953 hereinafter called the 'Notification', issued by the Government of Madhya Bharat under the Madhya Bharat Sales Tax Act, Samvat 2007 (XXX of 1950) hereinafter called the Act.

The facts are as follows :—Hiralal, the respondent, is the manager of a joint Hindu family carrying on business in the name and style of "Messrs. Tilokchand Kalyanmal". The joint family owns a re-rolling mill situated in Indore City called the Central India Iron and Steel Company. The said family purchases scrap iron locally and imports iron plates from outside and after converting them into bars, flats and plates in the Mills sells them in the market. The respondent made a default in furnishing the returns prescribed by section 7 (1) of the State Sales Tax Act for the period 1st April, 1954 to 31st March, 1955. On 27th February, 1956, the Sales Tax Officer, Indore, determined the taxable turnover at Rs. 2,26,000 and the sales tax payable thereon at Rs. 8,000; and he also imposed a penalty of Rs. 1,000 under section 14 (1) (c) of the Act. On the same day he issued demand notices to the respondent for the payment of the said sales tax and the penalty. On 10th September, 1956, the respondent filed a petition in the High Court of Madhya Bharat (afterwards Madhya Pradesh) under Articles 226 and 227 of the Constitution for the issue of appropriate writs quashing the assessment of tax and penalty and to restrain the State from giving effect to the said orders of the Sales Tax Officer. A Division Bench of the High Court held that the iron bars, flats and plates sold by the respondent were exempted from sales tax under the Notification. In that view, the orders of the Sales Tax Officer were quashed. The State has filed the present appeal, by Special Leave.

The only question in this appeal is whether the said iron bars, flats and plates are not iron and steel within the meaning of Item No. 39 of the Notification.

Parliament enacted Essential Goods (Declaration and Regulation of Tax on Sales or Purchases) Act, 1952 (LII of 1952), which came into force on 9th August, 1952. In Schedule I of the said Act, iron and steel were declared essential for the life of the community. Thereafter, the Government of Madhya Bharat, in exercise of the powers conferred by section 5 of the Act, issued the Notification as also Notification No. 59, dated 24th October, 1953. The material part of Schedule I of Notification 58 reads :

"No tax shall be payable on the sale of the following goods.—

S. No.

Description of goods.

39

Iron and Steel.

Notification No. 59 described the goods sales of which were taxable at particular rates. Schedule IV thereof reads :

'List of articles under section 5 of the Madhya Bharat Sales Tax Act, 1950, on the assessable sale proceeds of which sales tax at the rate of Rs. 3-2-0 per cent. shall be payable showing the nature of articles on which the tax is payable.'

S. No.

Name of article.

Stage of sale in Madhya Bharat at which the tax is payable.

9.goods prepared from any metal other than gold and silver.....

- Sale by importer or producer."

Learned Counsel for the State contends that the expression "iron and steel" means iron and steel in the original condition and not iron and steel in the shape of bars, flats and plates. In our view, this contention is not sound. A comparison of the said two Notifications brings out the distinction between raw materials of iron and steel and the goods prepared from iron and steel : while the former is exempted from tax, the latter is taxed. Therefore, iron and steel used as raw material for manufacturing other goods are exempted from taxation. So long as iron and steel continue to be raw materials, they enjoy the exemption. Scrap iron purchased by the respondent was merely re-rolled into bars, flats and plates. They were processed for convenience of sale. The raw materials were only re-rolled to give them attractive and acceptable forms. They did not in the process lose their character as iron and steel. The dealer sold "iron and steel" in the shape of bars, flats and plates and the customer purchased "iron and steel" in that shape. We, therefore, hold that the bars, flats and plates sold by the assessee are iron and steel exempted under the Notification. The conclusion arrived at by the High Court is correct.

In the result, the appeal fails and is dismissed with costs.

V. S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYATULLAH, V. RAMASWAMI AND P. SATYANARAYANA RAJU, JJ.

The Lord Krishna Sugar Mills, Ltd.

.. *Appellant**

v.

The Municipal Board, Saharanpur

.. *Respondent.*

Municipality—Rules on Tolls in force in the Municipal Area of Saharanpur (1949) (before Amendment on 7th September, 1955), Rule 8 (a)—Toll tax payable on entry of goods within municipal limits—Exemption from under rule 8 (a) as being meant for immediate export—When can be claimed—Goods entering municipal limits passing out of export barrier and unloaded at railway station of Saharanpur for being exported by rail—Railway station situated beyond export barrier but within municipal limits—Such goods if entitled to exemption under rule 8 (a).

By majority (with *Hidayatullah, J.* dissenting) : A person would be entitled to transit pass under rule 8 (a), which would exempt him from payment of toll tax, if the goods he is bringing into the municipal limits are meant for immediate export from the municipal limits without sorting or change of bulk. Immediate export means that within half an hour from the time of issue of transit pass at the barrier of import, when the goods enter the municipal limits, the goods must arrive at the barrier of export which may be on the other side of the city and after checking by the *moharrir* at the barrier pass out of the municipal limits immediately which will take a few minutes more. But it does not follow from the fact that the goods have arrived at the barrier of export within half an hour from the time of issue of transit pass and have passed the export barrier that the goods are "meant for immediate export from municipal limits" if the goods are not sent out of the municipal limits after crossing the barrier of export and are unloaded within the municipal limits. The transit pass is only to be granted if the goods are "meant for immediate export". That means that the goods must go out of the municipal limits as soon as possible without sorting or change of bulk *i.e.*, in the same vehicle and their passing through the export barrier is taken to show that they are going out of the municipal limits. However, as a barrier is not necessarily at the end of the municipal limits, for its placing depends upon convenience, the reasonable interpretation of the rule is that where the municipal limits extend for some distance beyond the export barrier the goods must go out of the municipal limits after passing the export barrier if they are to be entitled to transit pass. But where, as in the present case, it is not in dispute that the goods do not go out of the municipal limits even after passing the export barrier and are unloaded at the railway station, which is situated beyond the export barrier but within the municipal limits, they would not be entitled to a transit pass though such unloading of the goods at the railway station is for the purpose of booking them by rail to destinations outside the municipal

limits. The intention of rule 8 (a) obviously is that a lorry which enters the municipal limit at one end and gets a transit pass should go out of the municipal area as soon as possible with the goods in the same condition in which they were when the lorry entered the municipal area and unless that is done the lorry would not be entitled to a transit pass.

Per *Hidayatullah, J.* (contra) :—Rule 8 (a) must be applied in a fair and equitable manner and one of the cardinal principles of law is that law does not expect, nor does it compel, a man to do that which he cannot possibly perform. The goods in the present case may not be for immediate export but they are meant for export and are in fact exported. The word “immediately” must be, in the circumstances, understood as allowing a reasonable time for export. A person cannot take the goods out of the municipal area on his own when they passed through the export barrier into the railway yard. Having done everything that can possibly be done the law does not compel him to do more.

Appeal from the Judgment and Decree, dated the 10th September, 1960, of the Allahabad High Court in Special Appeal No. 105 of 1957.

G. S. Pathak, Senior Advocate, (*B. Dutta* and *Naunit Lal*, Advocates, with him), for Appellant.

M. C. Setalvad, Senior Advocate (*D. K. Agarwala*, *M. L. Gupta* and *R. Ganapathy Iyer*, Advocates, with him), for Respondent.

The Court delivered the following Judgments:

Wanchoo, J. (on behalf of *P. B. Gajendragadkar, C.J.*, himself, *V. Ramaswami* and *P. Satyanarayana Raju, J.J.*):—The only question raised in its appeal on a certificate granted by the Allahabad High Court is the interpretation of rule 8 (a) of the Rules in force from 1st May, 1949, in the municipal area of Saharanpur with respect to tolls payable on entry of goods within the limits of the Saharanpur Municipality. We may add that the rules in question were changed from 7th September, 1955; but we are not concerned with those rules as the present dispute refers to a period before 7th September, 1955. The facts which are relevant in this connection lie in a narrow compass. The appellant, Lord Krishna Sugar Mills, carries on the business of manufacturing sugar and cloth. It is situate outside the limits of the Saharanpur Municipality. A large quantity of cloth is exported by the appellant to various places in India. Motor lorries loaded with bales of packed cloth leave the appellant's premises and carry these bales to the railway station where the bales are unloaded and booked by rail to various destinations without any sorting or change of bulk. The railway station of Saharanpur is situate within the municipal limits and therefore the lorries have to enter the municipal limits when they carry bales to the railway station. Further after bales are unloaded at the railway station they remain within the municipal limits till they are taken away by rail to destinations for which they are booked.

Rule 2 of the Rules on Tolls as in 1949 with which we are concerned provided that

“No person shall enter the toll limits of the Saharanpur Municipalities... with any headload, *bahangi* load, laden vehicle or any laden pack animal, on or in respect of which terminal toll is leviable, until the toll due has been paid to such persons and at such places as the Municipal Board may from time to time appoint”.

Rule 3 provided that

“when a laden man, laden vehicle or laden pack animal subject to terminal toll arrives at one of the barriers fixed by the Board the terminal toll due shall be paid at once by the person-in-charge of the head-load, *bahangi* load, laden vehicle or laden pack animal to the *moharrir* stationed at the barrier”.

Rule 8 (d) with which we are particularly concerned reads thus :

“If the person-in-charge of any motor lorry laden with taxable goods declares in writing to the *moharrir* at the import barrier that the goods he is importing into the limits of the Municipality are meant for immediate export from such limits without sorting and change of bulk, the *moharrir* shall issue a transit pass in Form 61 of the M.A.C. to such person-in-charge of the motor lorry, who shall present the same together with the motor lorry carrying the goods covered thereby to the *moharrir* at the barrier of export within half an hour from the time of issue of the transit pass.”

Dispute arose between the appellant and the Municipality on the question whether the appellant was entitled to the benefit of rule 8 (a) which would exempt it from the payment of toll tax when it sent its goods to the railway station at Saharan-

pur for booking to various destinations by rail. It appears that there is a municipal barrier near the railway station and the appellant's lorries carrying goods first entered the Municipal limits at some place near the appellant's premises and then proceeded towards the railway station. Before reaching the station, the lorries had to pass out of the barrier near the station. This barrier apparently was meant to serve two purposes. It was an import barrier for goods coming into the Municipality from the railway station and from that side. It was also an export barrier for goods going outside the Municipality. But the barrier was not placed exactly where the municipal limits ended : it was at some distance inside the Municipal limits so that the lorries of the appellant going out of the barrier and proceeding to the railway station were still within the municipal limits and the goods when unloaded at the railway station for booking were still within municipal limits. It is at some distance beyond the railway station that the municipal limits come to an end. It was not in dispute that the lorries of the appellant carrying the goods to the railway station never went out of the Municipal limits and the goods were unloaded at the railway station and remained within the municipal limits. The Municipality claims that it was entitled to charge the toll tax as the goods never left the municipal limits and that rule 8 (a) only applied to those cases where the goods actually left the municipal limits within half an hour of entry. The appellant on the other hand contended on an interpretation of rule 8 (a) that it was entitled to the transit pass as the railway station was beyond the municipal barrier on that side and the lorries passed that barrier and in the circumstances if the lorries passed that barrier within half an hour of their entry into the municipal limits rule 8 (a) was complied with and the appellant was entitled to a transit pass which would then exempt it from toll tax. The Municipal Board did not accept this interpretation of rule 8 (a). The appellant therefore had to pay the toll tax and did so under protest. It however filed a writ petition in the High Court *inter alia* contending that its interpretation of rule 8 (a) was correct and it was entitled to get transit passes for its lorries. There were other grounds also on which rule 8 (a) was assailed, but we are not concerned in the present appeal with those grounds.

The learned Single Judge rejected all the contentions of the appellant. He also rejected the interpretation placed on rule 8 (a) on behalf of the appellant. He held that what rule 8 (a) contemplated was that the goods should leave the Municipality ; as the appellant's lorries did not leave the municipal limits but were unloaded at the railway station which was admittedly within the municipal limits the appellant was not entitled to transit passes for its lorries.

The appellant then went in appeal to a Division Bench, and the Division Bench upheld the interpretation put on rule 8 (a) by the learned Single Judge. In consequence the appeal was dismissed. Thereupon the appellant applied for a certificate which was granted by the High Court; and that is how the matter has come up before us.

The whole dispute in the present case has arisen on account of the fact that the municipal barrier on the side of the railway station is not near the municipal limits ; it has been placed at some distance within the municipal limits. Beyond the barrier is the railway station which is within municipal limits and beyond that also for some distance the municipal limits continue. The appellant therefore contends that all that rule 8 (a) requires is that after its lorries had entered the municipal limits, they would be entitled to transit passes if they go out of the municipal barrier at the other end and even though thereafter they might still remain within the municipal limits. In other words the appellant's contention is that all that rule 8 (a) requires in order to entitle it to a transit pass and thus escape the toll tax is that its lorries should go out of the municipal barrier at the other end of the city even though they may still be within municipal limits.

We are of opinion that this is neither the intention nor the meaning of rule 8 (a). The crucial words in the rule are "meant for immediate export from such limits without sorting and change of bulk." A person would thus be entitled to a transit

pass under rule 8 (a) if the goods he is bringing into the municipal limits are meant for immediate export from the municipal limits without sorting or change of bulk. The latter part of rule 8 (a) is meant to lay down a procedure to check this. Reading the two parts together, immediate export means that within half an hour from the time of issue of transit pass the goods must arrive at the barrier of export which may be on the other side of the city and after checking by the *moharrir* at the barrier pass out of the municipal limits which will take a few minutes more. But it does not follow from the fact that the goods have arrived at the barrier of export within half an hour from the time of issue of transit pass and have passed the export barrier that the goods are "meant for immediate export from municipal limits" if the goods are not sent out of the municipal limits after crossing the barrier of export and are unloaded within municipal limits. The transit pass is only to be granted if the goods are "meant for immediate export from such limits". That means that the goods must go out of municipal limits as soon as possible, and half an hour's period provided for their arrival at the export barrier after the issue of transit passes is meant merely to check this fact. The rule clearly contemplates that the goods must leave the municipal limits as soon as possible without sorting or change of bulk, i.e., in the same vehicle and their passing through the export barrier is taken to show that they are going out of the municipal limits. However, as a barrier is not necessarily at the end of the municipal limits for its placing depends upon convenience, the reasonable interpretation of the rule is that where the municipal limits extend for some distance beyond the export barrier the goods must go out of the municipal limits after passing the export barrier if they are to be entitled to transit pass. But where, as in the present case, it is not in dispute that the goods do not go out of the municipal limits even after passing the export barrier and are unloaded at the railway station which is within municipal limits they would not be entitled to a transit pass. The drafting of rule 8 (a) is not very happy and the difficulty has arisen because the export barrier in the present case is well within municipal limits. But it seems to us clear that what rule 8 (a) intends, when it says that on a declaration that the goods are meant "for immediate export from such limits without sorting and change of bulk", a transit pass would be granted is that the goods would be taken out of municipal limits as soon as possible after entry. What the latter part provides is the method of checking that the goods are taken out immediately from municipal limits. When however the goods are not taken out immediately from municipal limits and may lie at the railway station which is within the municipal limits for a length of time, the benefit of transit pass under rule 8 (a) cannot be allowed. We agree with the High Court that the intention of the rule is that motor lorries to which the rule applies after entering municipal limits are to pass out of the same with the least possible delay; and before a person can claim the benefit of the rule it is necessary to satisfy the condition that the lorry reached the export barrier within the time limited by the rule. The intention of the rule obviously is that a lorry which enters the municipal limit at one end and gets a transit pass should go out of the municipal area as soon as possible with the goods in the same condition in which they were when the lorry entered the municipal area, and half an hour's period provided in the latter part of the rule is merely for the purpose of checking at the export barrier that this is actually done. Where, as in the present case, lorries were never meant to proceed beyond the railway station, and the railway station was within the municipal area, there could be no question of grant of transit passes to such lorries. As we have said already the crucial words in rule 8 (a) are "for immediate export from such limits without sorting and change of bulk" and these mean that the goods must go out of the municipal limits as soon as possible on the lorry on which they have entered and, unless that is done the lorry would not be entitled to a transit pass. The latter part of the rule is merely a method for checking that this has happened.

The appeal therefore fails and is hereby dismissed with costs.

Hidayatullah, J.—The railway station at Saharanpur is admittedly situated within the municipal limits. Any one going from the railway yard to the town

must pass a municipal gate which serves as the toll barrier for persons, vehicles and goods entering the municipal area from the station side. Any one entering the railway yard must also pass the same gate which serves as an export barrier and a checking post for persons, vehicles and goods passing out of the municipal area. This toll barrier is not placed at the boundary of the municipality but somewhat within it and it separates the yard from the municipality proper. There is no barrier beyond the railway territory.

The appellant, Lord Krishna Sugar Mills, manufactures sugar and cloth. The mills are situated outside Saharanpur Municipality but their goods, which are carried in trucks, have to pass the export barrier to enter the station yard from where they are booked without any sorting or change of bulk to destination outside Saharanpur Municipality. It is not denied that if these goods are brought back they must pass the barrier again.

The Municipality levies tolls under its rules on goods, entering the Municipality and no person with a head-load, bahangi-load, laden vehicle or laden pack animal can enter the municipal limit until toll is paid at one of the toll barriers fixed by the Municipal Board. There is, however, a concession in respect of goods carried on a motor lorry which are in transit across the municipal territory. This concession is given by rule 8 (a) and the concession is the subject of the dispute between the Mills and the Municipality in this appeal. Rule 8 reads:

"8. (a) If the person in charge of any motor lorry laden with taxable goods declares in writing to the moharrir at the import barrier that the goods he is importing into the limits of the Municipality are meant for immediate export from such limits without sorting and change of bulk, the moharrir shall issue a transit pass in Form 61 of the M.A.C. to such person in charge of the motor lorry, who shall present the same together with the motor lorry carrying the goods covered thereby to the moharrir at the barrier of export within half an hour from the time of issue of the transit pass.

(b) The moharrir shall retain the transit pass and after he has verified the lorry and the goods therein with the entries in the transit pass allow such lorry with the goods to pass out of the barrier and shall sign a certificate to this effect on the transit pass.

(c) In case of pass being presented after the expiry of the time allowed for transit or there being a discrepancy in the description of the lorry presented or the goods carried thereby, the moharrir shall make a note to this effect on the transit pass and shall submit the same to the Tax Inspector or Superintendent. The fee for transit pass shall be Rs. 2 per lorry."

The Municipal Committee insists on keeping the amount of toll paid by the Mills and refuses the pass even though the goods are carried to the railway yard and are taken out of the export barrier at the railway station, on the ground that the goods do not pass out of the municipal limits *immediately* but remain within those limits even after passing the export barrier. This is because the yard is within the municipal limits and the goods have to be booked, and before booking lie in the yard for some time, and, even after booking are not carried away immediately.

The Mills feeling aggrieved filed a petition under Article 226 of the Constitution in the High Court of Allahabad for a writ to restrain the Municipality from withholding the refund. The petition was dismissed by Mr. Justice Mehrotra on 12th February, 1957, and a special appeal under the Letters Patent was also dismissed by Mootham, C.J., and A. P. Srivastava, J., on 10th September, 1960. This appeal is filed by the Mills on a certificate granted by the High Court.

My learned brother Wanchoo has affirmed the decisions in the High Court. In my opinion, and I say it respectfully, the contention of the Mills is well founded. The intention of the rule undoubtedly is to free goods in transit from tolls on proof that they have been exported from the municipal limits as required by rule 8 (a) the question is: what does rule 8 (a) require a person to do and what can the Mills do in the present circumstances? Rule 8 (a) analysed shows that the person in charge of a truck laden with taxable goods has to declare in writing to the moharrir at the import barrier that the goods which are being imported are meant for immediate export from such limits without sorting and change of bulk. This declaration is made by the persons in charge of the trucks belonging to the Mills. The moharrir to whom such declaration is made, then issues a transit pass in Form 61 of the M.A.C. and the person to whom it is issued has to present it together with the truck carrying

the goods covered by the transit pass to the *moharrir* at the barrier of export within half an hour from the time of issue of the transit pass. This is also complied with by the person in charge of the trucks belonging to the Mills. The goods then pass the export barrier and without sorting and change of bulk. The goods are next unloaded on the railway premises and the trucks return empty. No doubt some time passes before the goods are booked and some more time passes before they are loaded on trains and they do lie within the municipal limits, but as goods which have passed the export barrier and which cannot enter the municipal limits again without passing through an import barrier, they should merit a release from tolls. This is the result of the fact that the Municipality has established its barrier convenient to itself so as to segregate the railway yard from the town proper. It is to be remembered that persons coming to the railway station and passing through without entering the municipal barrier are not required to pay toll even though they technically enter the municipal limits. This is because the railway yard is not considered as the area where the Municipality chooses to impose its taxes. The Municipality imposes its taxes only when there is entry into the town from the railway yard. The same thing obtains when goods are exported through the export barrier and enter the railway yard. In so far as the Municipality is concerned it satisfies itself that the goods have passed out of the municipal area and are not likely to re-enter without paying toll. The rule must be applied in a fair and equitable manner and one of the cardinal principles of law is that law does not expect, nor does it compel, a man to do that which he cannot possibly perform. The goods may not be for "immediate" export but they are meant for export and are in fact exported. The word "immediately" must be, in the circumstances, understood as allowing a reasonable time for export. See Maxwell on the Interpretation of Statutes (Eleventh Edition), page 341, where the following passage occurs :

"When a statute requires that something shall be done 'forthwith', or 'immediately' or even 'instantly' it would probably be understood as allowing a reasonable time for doing it" The Mills cannot take the goods out of the municipal area on their own when they have passed through an export barrier into the railway yard. Having done everything that can possibly be done the law does not compel them to do more. I may mention here that in the *Central India Spinning and Weaving and Manufacturing Co., Ltd., The Empress Mills, Nagpur v. The Municipal Committee, Wardha*¹, this Court allowed refund in respect of goods entering a municipal barrier but passing out of the municipal limits in the same trucks, even though there was no provision for a declaration or a transit pass or an export barrier. It was pointed out what the words 'import' and 'export' meant in such a context. The word 'import,' it was held, was not merely bringing into but something more, i.e., incorporating and mixing up of the goods, imported with the mass of the property and 'export,' it was also held, had reference to taking out of goods which had become part and parcel of the mass of the property in the local area. Goods in transit were, therefore, held to be neither imported nor exported. It was on this ground that goods which are on trains in municipal area were held neither to be imported nor exported. The present case is even stronger.

In my judgment, the Municipality by its own arrangement, regards the station yard as being outside its export barrier. If the same goods are brought in again the next day or the day after, they will bear the tax at the import barrier. No plea, I am sure, will be heard that these goods had paid the toll at the other end of Saharanpur Municipality and were within the municipal limits all the time. The import barrier will be treated a toll barrier even for these goods.

In this view of the matter I am of opinion that the appeal must be allowed with costs and I would order accordingly.

ORDER OF THE COURT.—In accordance with the opinion of the majority the appeal is dismissed with costs.

V.K.

Appeal dismissed.

1. (1958) S.C.J. 604 : (1958) S.C.R. 1102 : A.I.R. 1958 S.C. 341.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, J. R. MUDHOLKAR AND R. S. BACHAWAT, JJ.

Bhagwan Das

.. Appellant*

v.

The State of Punjab

.. Respondent.

Punjab Security of Land Tenures Act (X of 1953), sections 9 (1) (i), 19-F (b)—Application by a small landowner for ejectment of tenant—Landlord, a displaced person—Allottee of lands of less than fifty standard acres—Small landowner—On the date of application for eviction, granted more than fifty standard acres under consolidation proceedings—Status of small landowner—To be decided as on the date of commencement of Act and not as on the date of application for eviction.

The appellant, a displaced person, was allotted by the Custodian in 1949, land equivalent to 4² standard acres 11 units, a permissible area under section 2 (3) (ii) (b) proviso of the Act and as he did not own any other land in the State, was a small landowner within section 2 (2) of the Act. In 1955 as a result of consolidation proceedings under East Punjab Act L of 1948, the appellant was granted in exchange, land in excess of 50 standard acres. On the question, if he, as a small land owner can apply for the eviction of his tenant:

Held, The status of the appellant as a small landowner should be determined by evaluating his lands in terms of standard acres as on the date of the commencement of the Act and not as on the date of application for eviction. The appellant did not acquire any land after the commencement of the Act and there is no scope for evaluating the subsequent improvements in the land due to consolidation or otherwise. If he was a small landowner at the commencement of the Act he continued to be so and the consolidation proceedings cannot alter the status.

Per Mudholkar, J.—Where the landlord displaced person is allotted less than 50 standard acres, the permissible area would be the area actually allotted to him. Provisions of the Act relating to surplus area are inapplicable and no question can arise of evaluating his lands afresh. Sections 19-B and 19-F of the Act deal with cases of augmentation to the land held by the landlord, subsequent to the commencement of the Act, by inheritance, bequest or gift. The omission, therefore, to make any provision as to what has to be done, if as a result of improvements made by the landlord or by reason of the rise in the yield of the land through other causes, would point only to one conclusion and that is that this circumstance is not to be taken into account for evaluating the land afresh and re-calculating the standard acreage.

Appeal by Special Leave from the Order dated the 23rd August, 1961 of the Punjab High Court in Civil Misc. No. 120 of 1961.

Bhawani Lal, E. C. Agarwala and P. C. Agarwala, Advocates, for Appellant.

Deepak Data Chaudhri and B. R. G. K. Achar, Advocates, for Respondents Nos. 1 to 3.

Janardhan Sharma, Advocate, for Respondent No. 4.

The Court delivered the following Judgments:

Bachawat, J. (for *Subba Rao, J.* and himself)—The appellant is a displaced person to whom 105 ordinary acres of land equivalent to 42 standard acres 11 units in village Jamalpur, Tehsil Hansi District Hissar, were allotted by the Custodian on 5th October, 1949, under the conditions published in the Notification of the East Punjab Government No. 4892/S, dated 8th July, 1949. The Punjab Security of Land Tenures Act, 1953 (Punjab Act X of 1953), hereinafter referred to as the Act came into force on 5th April, 1953. On that date, the aforesaid land was equivalent to 42 standard acres 11 units, and having regard to proviso (ii) (b) to section 2 (3) of the Act, was permissible area in relation to the appellant, and as the appellant did not own any other land in the State of Punjab, he was a small landowner within the meaning of section 2 (2) of the Act. On 22nd October, 1955, as a result of

consolidation proceedings, the appellant was granted 101.4/5 ordinary acres of land in exchange for the land originally allotted to him in 1949. Respondent No. 4 is a tenant of the appellant in respect of a portion of this land.

On 20th February, 1958, the appellant filed an application before the Assistant Collector, 1st Grade, Hissar for ejectment of respondent No. 4 under section 9 (i) (i) of the Act on the ground that he is a tenant of the appellant who is a small landowner. On that date, the aforesaid 101.4/5 acres of land owned by the appellant was equivalent to more than 50 standard acres. On 17th February, 1960, the Assistant Collector dismissed the application. He held that the appellant was a big landowner, because on the date of the application the land owned by him was equivalent to more than 50 standard acres. On appeal, on 2nd May, 1960, the Collector of Hissar set aside the aforesaid order, and allowed the application for ejectment. He held that the appellant was a small landowner as he was a displaced person and an allottee of less than 50 standard acres. On 30th August, 1960, the Commissioner, Ambala Division, dismissed a second appeal, and on 2nd January, 1961, the Financial Commissioner dismissed a revision petition filed by respondent No. 4. Following his previous ruling in *Pat Ram v. Milawa Ram*¹ and *Har Chand Singh v. The Punjab State*², the Financial Commissioner held that the status of the appellant must be determined on the date of the commencement of the Act and subsequent accretions to his holdings arising out of consolidation of holdings and improvements due to good husbandry or advent of irrigation should be ignored. On 22nd August, 1961, the Punjab High Court allowed a petition preferred by respondent No. 4 under Article 227 of the Constitution of India and set aside the orders of the Collector, the Commissioner and the Financial Commissioner. The High Court held that the status of the appellant must be determined by evaluating his land in terms of standard acres on the date of the application for ejectment. The appellant now appeals to this Court by Special Leave.

The question is whether the appellant is a small landowner within the meaning of section 9 (1) (i) of the Act. On a combined reading of sections 2, 3, 4, 5, 5-A, 5-B, 5-C, 10-A, 19-A, and 19-B the scheme of the Act appears to be as follows: The entire land held by the landowner in the State of Punjab on the date of the commencement of the Act must be evaluated as on that date and the status of the landowner and his surplus area, if any, must be then ascertained. If he is then found to be a small landowner, he continues to be so for the purpose of the Act, until he acquires more land, and on taking into account the value of the land in terms of standard acres on the date of the acquisition, he is found to be a big landowner. The landowner is required to make the necessary reservations or selections and to give the necessary declarations so that his status and the surplus area, if any, held by him may be so determined. If he is a small landowner at the commencement of the Act, his status is not altered by reason of improvements in the value of his land or re-allotment of land on compulsory consolidation of holdings.

In an unreported decision in *Surja v. Financial Commissioner of Punjab and others*³, the Punjab High Court held that the status of the landowner for the purposes of an application under section 14-A of the Act should be determined by evaluating his land on the date of the application. On the basis of this ruling, the improvements in the land subsequent to the commencement of the Act could not be ignored; but the Legislature considered that this decision had the effect of defeating the purpose of the Act. It is well-known that with a view to get rid of this decision, the Legislature inserted section 19-F (b) in the Act by the Punjab Security of Land Tenures (Amendment and Validation) Act, 1962 (Punjab Act XIV of 1962). The object of this amendment will appear from the following passage in the Statement of Objects and Reasons published in the Punjab Gazette (Extraordinary), dated 27th April, 1962:

1. (1961) 40 L. L. T. 28.
2. (1961) 40 L. L. T. 9.

3. Civil Writ No. 486 of 1961.

"Some of the recent judicial pronouncements have the effect of defeating the objectives with which the Punjab Security of Land Tenures Act, 1953 was enacted and amended from time to time Under the scheme of the Parent Act a specific period was allowed for filing of reservations by the landowners the object of which was to find out whether a person was a small landowner or not. Once that was found the intention was that such a person should continue to be treated as such for the purposes of the Act so long as he did not acquire more lands. In other words, his status was not to be altered on account of improvements made on the land or reallocation of land during consolidation. However, the High Court took a different view in (*Surja v. Financial Commissioner, Punjab and others*)¹ Accordingly clauses 3, 6, and 7 of the Bill seek to neutralise the effect of the aforesaid decisions."

Clause 7 of the Bill related to sections 19-E and 19-F. The amending Act of 1962 was passed on 4th July, 1962 during the pendency of the appeal in this Court. Section 19-F is retrospective in operation and is deemed to have come into force on 15th April, 1953. Section 19-F (b) reads :

"19-F. For the removal of doubts it is hereby declared,—

* * * * *

(b) that for evaluating the land of any person at any time under this Act, the land owned by him immediately before the commencement of this Act, or the land acquired by him after such commencement by inheritance or by bequest or gift from a person to whom he is an heir, shall always be evaluated for converting into standard acres as if the evaluation was being made on the date of such commencement, and that the land acquired by him after such commencement in any manner shall always be evaluated for converting into standard acres as if the evaluation was being made on the date of such acquisition."

On a reading of section 19-F (b), it would appear that for the purpose of determining the status of the landowner and evaluating his land at any time under the Act, the land owned by him immediately before the commencement of the Act must always be evaluated in terms of standard acres as if the evaluation was being made on the date of such commencement. It is not disputed that if the land held by the appellant immediately before the commencement of the Act is so evaluated, the appellant would be a small landowner. There is no scope for evaluating the subsequent improvements in the land due to consolidation operations or otherwise. The appellant did not acquire any land after the commencement of the Act. His status as a small landowner was not altered by reason of subsequent improvements or re-allotments of land on compulsory consolidation of holdings. On the date of the application for eviction, he, therefore, continued to be a small landowner. The High Court was in error in holding that the status of the appellant should be determined by evaluating his land in terms of standard acres on the date of the application for eviction.

In the result, the appeal is allowed. We set aside the order of the High Court and restore that of the Financial Commissioner upholding the orders of the Commissioner and the Collector. We direct that costs throughout will be borne by the parties as incurred.

Mudholkar, J.—This is an appeal by Special Leave from a judgment of the High Court of Punjab allowing a writ petition under Article 227 of the Constitution and setting aside orders of the Collector, the Commissioner and the Financial Commissioner made under certain provisions of the Punjab Security of Land Tenures Act, 1953 (hereafter referred to as the Act).

The relevant facts are briefly these: The appellant Bhagwandas is a displaced person from West Pakistan. He owned 74 standard acres 13 $\frac{3}{4}$ units of agricultural land in certain villages in West Pakistan. On 5th October, 1949 he was allotted 42 standard acres and 11 units of land in the village Jamalpur, Tehsil Hansi, District Hissar. Subsequently proceedings for consolidation of holdings were taken under the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948 (L of 1948). After those proceedings were finalised the appellant was granted an equivalent area of land in the same village as described in a sanad granted by the President on 22nd October, 1955, in exchange for the land earlier granted to him. Under the sanad the appellant was granted proprietary rights in the land.

On 20th February, 1958 the appellant, claiming to be a small holder made an application under section 14-A (i) of the Punjab Security of Land Tenures Act, 1953, before the Assistant Collector, I Grade, Hissar, for the ejectment of respondent No. 4 who was a tenant of the land. In his application the appellant alleged that as he held less than 50 standard acres of land he was a "small landowner" and as such had the right to be tenant and instead cultivate the land himself. The application was rejected by the Assistant Collector. Unfortunately neither party has placed the order of the Assistant Collector on the record of this appeal. It is, however, common ground that the reason for rejecting the application was that the Assistant Collector found that because of certain improvements the income from the lands had risen considerably and that consequently the standard acreage of this land had risen from 42 standard acres to a standard acreage above 50 standard acres and that the appellant's application was, therefore, untenable under section 14-A. In an appeal preferred by the appellant the Collector, Hissar held by his order, dated 2nd May, 1960, that since the appellant was allotted only 42 standard acres and 11 units he is entitled to be treated as a small owner of the land and since the tenant had more than 5 standard acres under his cultivation in addition to the appellant's land he was liable to be ejected from the land belonging to the appellant which was in his possession. The Collector's order was upheld by the Commissioner, Ambala Division by his order dated 30th August, 1960. The tenant moved the Financial Commissioner, Punjab in revision against the order of the Commissioner but without success. He then preferred a writ petition before the High Court which, as already stated, was granted. According to the High Court the status of a landlord had to be ascertained as existing on the date of the application under section 14-A of the Act and not on the date of the allotment. Further, according to the High Court, what is "permissible area" available to a landlord under the Act has also been determined as obtaining on the date of the application for eviction made by the landlord. In coming to the conclusion the High Court followed a judgment of S. B. Kapoor, J., in a similar matter.

In order to appreciate the contentions urged before us on behalf of the parties, it is necessary to refer to certain provisions of the Act. At the outset I must point out that the object of the Act was to provide to the tenants a security against ejectment by the landlord except for a just cause. The Act has, however, drawn a distinction between "small land owner" and a "large landowner". Sub-section (2) of section 2 of the Act defines small landowner to mean one whose entire land in the State of Punjab does not exceed the permissible area. Now, sub-section (3) of section 2 defines permissible area. This definition draws a distinction between a landowner who is not a displaced person and one who is a displaced person. In so far as the former is concerned the permissible area is 30 standard acres. In so far as the latter is concerned the second proviso to sub-section (3) enacts :

"Provided that—

* * * * *

(ii) for a displaced person—

(a) who has been allotted land in excess of fifty standard acres, the permissible area shall be fifty standard acres or one hundred ordinary acres, as the case may be;

(b) who has been allotted land in excess of thirty standard acres, but less than fifty standard acres, the permissible area shall be equal to his allotted area;

(c) who has been allotted land less than thirty standard acres, the permissible area shall be thirty standard acres, including any other land or part thereof, if any, that he owns in addition.

Explanation.—For the purposes of determining the permissible area of a displaced person, the provisions of proviso (ii) shall not apply to the heirs and successors of the displaced person to whom land is allotted."

The expression 'standard acre' is defined thus in sub-section (5) of section 2:

"'Standard acre' means a measure of area convertible into ordinary acres of any class of land according to the prescribed scale with reference to the quantity of yield and quality of soil."

If a landowner is in possession of land in excess of the permissible area he is required to follow a certain procedure for indicating which particular land he wants to be

treated as "reserved area". Land in excess of that area is treated as surplus area. The former expression means the area lawfully reserved under the Punjab Tenants (Security of Tenures) Act, 1950 while the latter expression is defined in sub-section (5-A) of the Act. It is not necessary to set out this definition for the purpose of the discussion of the question before us. Under section 27 of the Act Rules have been framed for carrying out the purpose of the Act. There are two sets of Rules, one is the Security of Land Tenures Rules, 1953 and the other is Punjab Security of Land Tenures Rules, 1956. The latter are supplementary to the Rules of 1953. Rule 2 of the Rules of 1953, which is the relevant rule, is as follows :

"Conversion of ordinary acres into standard acres.—The equivalent, in standard acres, of one ordinary acre of any class of land in any assessment circle, shall be determined by dividing by 16, the valuation shown in Annexure 'A' to these Rules for such class of land in the said assessment circles

Provided that the valuation shall be—

(a) in the case of Banjar Qadim land, one-half of the value of the class previously described in the records and in the absence of any specific class being stated, one-half of the value of the lowest barani land ;

(b) in the case of Banjar Jadid land, seven-eighth of the value of the relevant class of land a : previously entered in the records, or in the absence of specified class in the records, of the lowest barani land ; and

(c) in the case of cultivated thur land subject to waterlogging, one-eighth of the value of the class of land shown in the records or in the absence of any class, of the lowest barani land."

In the table, Annexure 'A', land is classified under four heads which are: "Irrigated (nehri)," "Irrigated Chahi," "Unirrigated" and "Sailab." Irrigated nehri is further classified as "perennial" and "non-perennial". In Col. 3 is given the valuation for irrigated nehri land. For Hansi Tehsil valuation of the land which is perennially irrigated by canals is given as 16 which means 16 annas in the rupee per acre and of non-perennial as 10 annas in the rupee per acre. The valuation for irrigated chahi land in the entire tehsil is 10 annas in the rupee per acre and of unirrigated land is 5 annas in the rupee per acre. There is no valuation for sailab land which apparently means there is no land of this category in the tehsil. From Table 'A' it would appear that land which falls under one classification at the time of allotment or at the time of coming into force of the Act may well fall under some other head later on because the quantity of yield is liable to vary. For instance if irrigation facilities come to be provided in land which is unirrigated at the time of coming into force of the Act or making the allotment it may receive the benefit, of irrigation later either perennially or non-perennially and its yield therefrom may accordingly increase.

Provisions relating to the valuation of lands under the Act are to be found in section 19-F thereof which reads thus :

"For the removal of doubts it is hereby declared,—

(a) that the State Government or any officer empowered in this behalf shall be competent and shall be deemed always to have been competent, to determine in the prescribed manner the surplus area referred to in section 10-A of a land-owner out of the lands owned by such land-owner immediately before the commencement of this Act ; and

(b) that for evaluating the land of any person at any time under this Act, the land owned by him immediately before the commencement of this Act, or the land acquired by him after such commencement by inheritance or by bequest or gift from a person to whom he is an heir, shall always be evaluated for converting into standard acres as if the evaluation was being made on the date of such commencement and that the land acquired by him after such commencement in any other manner shall always be evaluated for converting into standard acres as if the evaluation was being made on the date of such acquisition."

Now, surplus area would fall to be determined only where the land-owner is in possession of land in excess of the permissible area. I have already given the definition of permissible area. Where, as here, the landlord is a displaced person and the land allotted to him is less than 50 acres the permissible area so far as he is concerned would be the area actually allotted to him. In the case of the appellant it would thus be 42 standard acres and 11 units. Out of this he alleges that he has sold 18 standard acres. As, however no argument was advanced before us on this basis I leave this circumstance out of account and proceed on the footing that the

appellant is in possession not of an area less than the permissible area but of an area equal to the permissible area. Suplus area means an area other than the reserved area and, where no area is reserved, the area in excess of the permissible area. Where there is no reserved area or where the area held by a person is not in excess of the permissible area the provisions of section 4 which deal with the reservation of area or those of sections 5-A to 5-C which deal with selection of permissible area or those of section 10-A which deal with the utilization of surplus area are not attracted. Therefore, the provisions of section 19-F (a) which are attracted to a case falling under section 10-A will also not apply. Moreover the provisions of section 10-A have no bearing on a case like the one before us. For, they contemplate the ascertainment of surplus area held immediately before the commencement of the Act. Obviously, therefore, the determination must refer to the classification of the land at that time. Apart from that, the appellant does not possess any surplus area since what is in his possession is merely the permissible area. The question of utilization of any surplus area cannot thus arise in his case. That being so, no question can arise of evaluating his lands afresh. Indeed, fresh evaluation at any time is permissible only under section 19-F (b) but that provision deals with only special types of cases. It may be mentioned that sections 5-A to 5-C which deal with the selection of permissible area do not contemplate a case where the classification of land held by the landlord has undergone a change because of rise in the yield therefrom and the standard acreage of the land in his possession could be said to have increased. Section 19-A of the Act specifically prohibits the future acquisition by the landlord of land by transfer, exchange, lease, agreement or settlement any land which with or without the land already held by him exceeds the permissible area. Similarly the Act has made specific provisions to deal with a case of augmentation to the land held by the landlord subsequent to the commencement of the Act by inheritance, bequest or gift. These are to be found in section 19-B. What is to be done in a case of that type is provided for by section 19-F (b). The power to evaluate land conferred by this provision is exercisable at 'any time' but obviously, that power is exercisable only in the context of the circumstances set out therein, that is to say where the landlord obtains land after the commencement of the Act by inheritance, bequest or gift and in no other circumstance. It would, therefore, seem that where the provisions of section 19-F are not attracted the Revenue Assistant before whom an application under section 14-A for ejectment of a tenant is made by a landlord, is not entitled to evaluate the land of the landlord afresh for ascertaining whether he is in possession of land in excess of the permissible area. Elaborate rules have been framed under the Act and elaborate provisions are also contained in the Act with a view to extend its protection as far as possible to tenants cultivating land. The omission, therefore, to make any provision as to what has to be done, if as a result of improvements made by the landlord or by reason of the rise in the yield of the land through other causes would point only to one conclusion and that is that this circumstance is not to be taken into account for evaluating the land afresh and re-calculating the standard acreage. If that is so, then it would follow that the High Court and the Assistant Commissioner were in error whereas the Collector, Commissioner and the Financial Commissioner were right in deciding this case. For these reasons I set aside the order of the High Court and restore that of the Financial Commissioner upholding the orders of the Commissioner and the Collector. In the particular circumstances of the case I, however, direct that costs throughout will be borne by the parties as incurred.

V.S.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, V. RAMASWAMI AND P. SATYANARAYANA RAJU, JJ.

M/s. British Paints (India), Ltd.

.. Appellant*

v.

Its Workmen

.. Respondents.

Industrial Dispute—Age of retirement—Distinction between clerical and subordinate staff and workmen in factory—Gratuity scheme (Provident fund scheme already existing)—Minimum period of service—Quantum—Basis of—Basic wage or wage and dearness allowance together.

The Seventh Industrial Tribunal, West Bengal, passed an award in an industrial dispute between M/s. British Paints (India) Ltd., and their workmen in the following terms : (i) the age of retirement was fixed at 58 years for the clerical and subordinate staff and at 55 years for factory workmen ; (ii) the period of minimum service of 5 years to earn gratuity in the following cases : (a) death of an employee while in service ; (b) discharge or voluntary retirement on grounds of medical unfitness ; (c) voluntary retirement or resignation, before reaching age of superannuation ; (d) retirement on reaching that age ; (e) termination of service by the company for reasons other than misconduct resulting in loss to the company ; (iii) while fixing 21 days' "basic wages or salary" it included dearness allowance in the said expression.

The company and the workmen preferred separate appeals by Special Leave against the said award.

Held : Considering the improvement in the standard of health and increase in the longevity in this country during the last fifty years, the age of retirement should be fixed at a higher level ; fixing the age of retirement generally at 60 years would be fair and proper unless there are special circumstances justifying fixation of a lower age.

Generally speaking there is no reason for making a difference in that behalf between the clerical staff and subordinate staff on the one hand and the factory workman on the other, unless justified on valid grounds (e.g.) work in the factory being much more arduous as compared with the clerical staff as in a heavy engineering concern. In this paint manufacturing concern the work in the factory cannot be considered particularly arduous to fix a lower age.

The age of retirement of both the categories has to be fixed at 60 years. The power of the employer to terminate the services of a workman if he becomes physically or mentally incapable of working, being there, there is no reason that such fixing at 60 years would impair the efficiency of work ; on the other hand there will be the added advantage of having the more experienced workman and thereby greater efficiency.

A longer minimum period of service in the case of voluntary retirement or resignation is necessary ; for, it makes it more probable that the workmen would stick to the company where they are working. Hence, the minimum period of qualifying service in such cases should be ten years and not five (as per the award).

The employee would be getting double retiring benefit (i.e.), provident fund and gratuity. In such a case the Tribunal should not have defined basic wages as including dearness allowance. There is no case for increasing the 21 days' wages per year of service to 30 days' wages as claimed by workmen.

Appeals by Special Leave from the Award dated the 5th March, 1964, of the Seventh Industrial Tribunal, West Bengal, in Case No. VIII-60 of 1963.

M. C. Setalvad, Senior Advocate, (D. N. Mukherjee, Advocate, with him), for Appellant (In C.A. No. 246 of 1965) and Respondent (In C.A. No. 287 of 1965).

A. S. R. Chari, Senior Advocate, (B. P. Maheshwari, Advocate, with him), for Respondent (In C.A. No. 246 of 1965) and Appellant (In C.A. No. 287 of 1965).

The Judgment of the Court was delivered by

Wanchoo, J.—These two appeals by Special Leave arise from the same award of the Seventh Industrial Tribunal, West Bengal, and will be dealt with together. Two matters in dispute between the management and the workmen were referred to the Tribunal relating to (i) the age of retirement of the workmen at the head office and the factory of the company and (ii) the introduction of a gratuity scheme for workmen employed at the head office and the factory. The Tribunal fixed the age of retirement for clerical and subordinate staff at 58 years and for workmen in the factory at 55 years. The Tribunal also introduced a gratuity scheme after considering the objections raised to the draft-scheme proposed by the company. Of the two appeals one is by the company relating to the gratuity scheme and the other by the workmen relating to the age of retirement as well as to the gratuity scheme.

We shall first consider the question of age of retirement. It may be mentioned that there was no retirement age in force in this company and so the position when the reference was made was that the workmen could continue to work so long as they were physically or mentally fit. The workmen contended that the age of retirement both for the head office and factory workmen should be fixed at 60 years. The company however proposed that the age of retirement should be 55 years for all workmen. The Tribunal as already indicated has fixed the age of retirement at 58 years for clerical and subordinate staff and 55 years for factory workmen and has apparently relied on the decision of this Court in *Workmen of Jessop Co., Limited v. Jessop and Company Limited*¹.

Now this is a case where there was no age of retirement before the reference was made and the workmen whether at the head office or at the factory were all entitled to work so long as they were physically or mentally fit. So far as the existing workmen are concerned, we think that the Tribunal should have fixed the age of retirement at 60 years both for the factory workmen as well as head office workmen. It is enough in this connection to refer to the decision of this Court in *Guest, Keen, Williams (Private), Ltd. v. Sterling (P.F.)*², where in a similar situation this Court fixed the age of retirement at 60 years in the case of existing workmen.

Then there is the question as to future workmen and whether their age of retirement should also be fixed at the same level as in the case of existing workmen. We are of opinion that generally speaking there should not be any difference in the age of retirement of existing workmen and others to be employed in future in a case like the present unless there are special circumstances justifying such differences. In this connection our attention is drawn to the case of *Guest, Keen, Williams (P.) Ltd.*², where the age of retirement of future workmen was 55 years. In that case however the age of retirement of future workmen was fixed at 55 years by the Standing Order and the question whether that age of retirement should be changed was not before this Court for consideration. All that this Court had to consider in that case was whether the age of retirement of existing employees, before the Standing Order fixing the age of retirement at 55 years was introduced, should be 60 years or not. In the present company so far there is no age of retirement and unless there are valid and cogent reasons for making a difference in the age of retirement of existing workmen and those employed in future, the future workmen should also have the benefit of the same age of superannuation.

Considering that there has been a general improvement in the standard of health in this country and also considering that longevity has increased, fixation of age of retirement at 60 years appears to us to be quite reasonable in the present circumstances. Age of retirement at 55 years was fixed in the last century in Government service and had become the pattern for fixing the age of retirement everywhere. But time in our opinion has now come considering the improvement in the standard of health and increase in longevity in this country during the last fifty years that the age of retirement should be fixed at a higher level, and we consider

1. (1964) 1 L.L.J. 451.

2. (1960) 1 S.C.R. 348 : (1959) 2 L.L.J.

405 : (1960) S.C.J. 281 : A.I.R. 1959 S.C. 1279.

that generally speaking in the present circumstances fixing the age of retirement at 60 years would be fair and proper, unless there are special circumstances justifying fixation of a lower age of retirement.

Now so far as the clerical and subordinate staff are concerned, we are of opinion that there is no reason for any difference in the age of retirement as between the existing staff and the future staff. Their work is exactly the same, and in the circumstances there should be the same age of retirement.

As to the factory workmen, it is urged that their age of retirement should be fixed at a lower level as work in the factory is more arduous than the work of clerical and subordinate staff, and in this connection reliance is placed on the decision of this Court in *Jessop and Company*¹, where one age was fixed for clerical and subordinate staff and a slightly lower age was fixed for the factory workmen. Here again we are of opinion that generally speaking, there is no reason for making a difference in the age of retirement as between clerical and subordinate staff on the one hand and factory workmen on the other, unless such differences can be justified on cogent and valid grounds. It is only where work in the factory is of a particularly arduous nature that there may be reason for fixing a lower age of retirement for factory workmen as compared to clerical and subordinate staff. This appears to have been so in the case of *Jessop and Company*¹, for that was a heavy engineering concern, where presumably work in the factory was much more arduous as compared to the work of clerical and subordinate staff. There might therefore have been then some justification for fixing a lower age of retirement for factory workmen in the case of those factories where the work is of a particularly arduous nature. But the present company is a paints manufacturing company and there is in our opinion no reason to suppose that the work in the factory in the present case is particularly arduous as compared to the work of clerical and subordinate staff. We therefore think that even in the case of future factory workmen in the present concern there is no special reason why the age of retirement should be fixed at a lower level. It is of course always possible for an employer to terminate the services of a workman if he becomes physically or mentally incapable of working before the age of retirement. This power being there, there is no reason to suppose that there will be inefficiency in work on account of fixing the age of retirement at 60 years; on the other hand with the age of retirement at 60 years there will be added advantage that more experienced workmen will be available to the management and that would be a cause for greater efficiency. On the whole therefore we are of opinion that the age of retirement in the case of factory workmen also in the present company should be fixed at the age of 60 years. We therefore modify the award of the Tribunal and fix the age of retirement for the clerical and subordinate staff as well as for the factory workmen, whether existing or future, at the age of 60 years.

We now turn to the gratuity scheme. Two points have been urged on behalf of the company in this connection. The Tribunal has fixed five years minimum service in order to enable a workman to earn gratuity. This has been provided in the event of—(a) death of an employee while in service of the company, (b) discharge or voluntary retirement of an employee on grounds of medical unfitness, (c) voluntary retirement or resignation before reaching the age of superannuation, (d) retirement on reaching the age of superannuation, or (e) termination of service by the company for reasons other than misconduct resulting in loss to the company in money and property. The management objects to the minimum period being five years in the case of voluntary retirement or resignation before reaching the age of superannuation. It is contended that gratuity schemes usually provide for a longer minimum of service in the case of voluntary retirement or resignation before reaching the age of superannuation. We think that there is substance in this contention. The reason for providing a longer minimum period for earning gratuity in the case of voluntary retirement or resignation is to see that workmen do not leave one concern after another after putting the short minimum service qualifying for gratuity. A longer minimum in the case of voluntary retirement

or resignation makes it more probable that the workmen would stick to the company where they are working. That is why gratuity schemes usually provide for a longer minimum in the case of voluntary retirement or resignation. We may in this connection refer to *The Express Newspapers (P.) Ltd. v. The Union of India*¹, where a short minimum for voluntary retirement or resignation was struck down.

Again in *The Garmen Cleaning Works v. Its Workmen*², 10 years minimum was prescribed to enable an employee to claim gratuity if he resigned.

In *The Management of Wenger and Company v. Their Workmen*³, a distinction was made between termination of service by the employer and termination resulting from resignation given by an employee. In the first case the minimum was fixed at 5 years; in the second the minimum period was fixed at 10 years by this Court.

We therefore modify the gratuity scheme in this regard and order that in the case of voluntary retirement or resignation by an employee before reaching the age of superannuation, the minimum period of qualifying service for gratuity should be ten years and not five years as prescribed by the Tribunal.

The next point that has been urged on behalf of the management in this connection is that the tribunal has while fixing 21 days' basic wage or salary as the quantum for gratuity for each completed year of service included dearness allowance in the words "basic wage or salary". It is urged that the usual pattern of gratuity scheme provides for gratuity on basic wages, and dearness allowance generally speaking is not included in basic wages for fixing the quantum of gratuity. It is further urged that by including dearness allowance within the definition of "basic wages or salary" as given in the scheme in this case, the Tribunal has really more or less doubled the quantum of gratuity for each completed year of service. There is in our opinion force in this contention also. In *May and Baker (India), Ltd. v. Their workmen*⁴, the workmen claimed in this Court that gratuity should be fixed on gross salary. In that case the Tribunal had fixed the quantum on basic salary i.e., it had not included dearness allowance for this purpose and the reason given by the Tribunal for fixing the quantum of gratuity on basic salary was that the workmen in that case were getting double retiring benefit, namely both gratuity and provident fund. That view of the Tribunal was upheld by this Court.

On the other hand, it has been urged that in some cases quantum of gratuity has been fixed on gross salary i.e., basic wages plus dearness allowance and in this connection reference was made to *British India Corporation v. The Workmen*⁵. In that case this Court upheld the award of the Tribunal fixing gratuity on the basis of consolidated wages. This Court pointed out that the usual pattern was to fix quantum of gratuity on the basis of basic wages but refused to interfere in that case because the practice in the concern in that case already existing was to fix gratuity on consolidated wages.

In the present case also there is a provident fund scheme in force. So with the introduction of the gratuity scheme, the employees will be getting double retiring benefit. In such circumstances we are of opinion that the Tribunal should not have defined basic wages so as to include dearness allowance. Besides as the gratuity scheme is being introduced for the first time in this concern, it would be proper to follow the usual pattern of fixing the quantum of gratuity on basic wages (excluding dearness allowance), specially when there is another retiring benefit in the shape of provident fund already existing in this concern. We therefore modify the award of the Tribunal in this respect and order that gratuity should be paid at the rate of 21 days' basic wages or salary for each completed year of service, and this basic wages will not include dearness allowance or any other allowance. Subject to these modifications, the scheme framed by the Tribunal will stand.

1. (1958) S.C.J. 1113; (1959) S.C.R. 12 at p. 158; A.I.R. 1958 S.C. 578
 2. (1962) 1 S.C.R. 711, 714; A.I.R. 1962 S.C. 673.
 3. (1963) 2 S.C.R. (Supp.) 862; A.I.R. 1964 S.C. 864.
 4. (1961) 2 L.J. 94.
 5. (1965) Vol. 10, Fac. L.R. 244.

The workmen have also assailed the gratuity scheme and their case is that they should have been granted 30 days' wages as prayed for by them instead of 21 days' basic wages fixed by the Tribunal. We do not think, there is any case for increasing the quantum of gratuity fixed by the Tribunal at 21 days' basic wages as modified by us for each completed year of service, for there is a provident fund scheme also in force in this concern and the workmen are thus getting two retiring benefits. No other point has been pressed before us.

We therefore partly allow the appeal of the company and make the two modifications in the gratuity scheme as indicated above. We also partly allow the appeal of the workmen and fix the retirement age for all workmen—existing or future—clerical, subordinate and factory workmen at 60 years. In the circumstances we make no order as to costs in both the appeals.

K.G.S.

Appeals partly allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, V. RAMASWAMI, AND P. SATYANARAYANA RAJU, JJ.

Binayak Swain

.. *Appellant**

v.

Ramesh Chandra Panigrahi and another

.. *Respondents.*

Civil Procedure Code (V of 1908), section 144—Scope—Plaintiff decree-holder himself purchasing properties sold in execution of an ex parte decree against defendant—Ex parte decree set aside on appeal and case remanded for re-trial—Application by defendant for restitution under section 144—Such application coming for disposal after a fresh decree was passed in favour of plaintiff at re-trial—Defendant if entitled to restitution.

In a suit by the plaintiff based on a promissory note an *ex parte* decree was passed against the defendant, in execution of which some of the defendant's properties were sold and purchased in Court auction by the plaintiff decree-holder himself. Thereafter, on appeal the *ex parte* decree was set aside by the High Court and the suit was remanded for re-hearing and fresh disposal according to law. Thereupon, the defendant filed an application under section 144 of the Civil Procedure Code, for restitution of his properties purchased by the plaintiff. This application was stayed and came up for hearing after a fresh decree in favour of the plaintiff was passed at the re-trial and was confirmed by the High Court in Second Appeal. On the question whether the defendant was entitled to restitution of his properties, it was argued that after the suit was re-tried a fresh decree was passed in favour of the plaintiff, which was eventually affirmed by the High Court, and that therefore, the defendant was not entitled to restitution under section 144 of the Civil Procedure Code. Rejecting this argument,

Held, the defendant was entitled to restitution of the properties sold in execution of the *ex parte* decree, subject to equities in favour of the plaintiff, as at the time of the application for restitution, the decree in execution of which the properties were sold had been set aside. The defendant was entitled to restitution notwithstanding anything which happened subsequently, as the right to claim restitution is based upon the existence or otherwise of a decree in favour of the plaintiff at the time when the application for restitution was made.

Case-law reviewed ; *Lal Bhagwant Singh v. Rai Sahib Lala Sri Kishen Das*, (1953) S.C.R. 559, distinguished.

The principle of the doctrine of restitution is that on the reversal of a decree, the law imposes an obligation on the party to the suit, who received the benefit of the erroneous decree, to make restitution to the other party for what he has lost. This obligation arises automatically on the reversal or modification of the decree and necessarily carries with it the right to restitution of all that has been done under the erroneous decree ; and the Court in making restitution is bound to restore the parties, so far as they can be restored, to the same position they were in at the time when the Court by its erroneous action had displaced them from.

The properties were purchased by the decree-holder himself in execution of the *ex parte* decree and not by a stranger auction-purchaser. Therefore, after the *ex parte* decree was set aside in appeal

* C.A. No. 804 of 1963.

and after a fresh decree was passed on remand, the sale held in execution of the *ex parte* decree became invalid and the decree-holder who purchased the properties in execution of the invalid decree was bound to restore to the judgment-debtor what he had gained under the decree which was subsequently set aside.

Case-law discussed.

Appeal by Special Leave from the Judgment and Decree dated the 3rd January, 1961 of the Orissa High Court in appeal under Orissa High Court Order No. 3 of 1959.

K. R. Chaudhuri, Advocate, for Appellant.

C. B. Agarwala, Senior Advocate, (*B. Parthasarathy*, Advocate, and *J. B. Dadachanji*, *O.C. Mathur* and *Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

Ramaswami, J.—This appeal is brought by Special Leave on behalf of the judgment-debtor against the judgment of the Orissa High Court, dated 3rd January, 1961, in Letters Patent Appeal No. 3 of 1959.

The deceased-plaintiff filed Original Suit No. 500 of 1941 against the appellant-defendant in the Court of the Additional Munsif, Aska, claiming Rs. 970 on the basis of a promissory note. The suit was dismissed on 17th August, 1942. The plaintiff preferred an appeal No. 178 of 1942 before the District Judge who allowed the appeal and set aside the decree of the Munsif and decreed the suit *ex parte* on 9th March, 1943. Against this decree of the appellate Court, the appellant filed Second Appeal No. 100 of 1943 in the Orissa High Court which set aside the decree of the District Judge on 11th November, 1946 and remanded the suit to the lower appellate Court for disposal. The lower appellate Court in its turn remanded the suit to the trial Court by its judgment, dated 11th April, 1947. In the meantime the original plaintiff died and the present respondents were brought on record as his legal representatives. The suit was again dismissed by the trial Court on 29th November, 1947, but on appeal the Additional Subordinate Judge set aside the judgment and decree of the Munsif on 30th November, 1948. The appellant carried the matter in Second Appeal No. 12 of 1949 to the Orissa High Court which dismissed the appeal on 27th August, 1954.

After the *ex parte* decree was passed in Appeal No. 178 of 1942 by the District Judge on 9th March, 1943, the plaintiff executed the decree, attached the properties in dispute and himself purchased the properties in Court auction. The plaintiff also took delivery of the properties on 17th May, 1946 and since that date the respondents have been in possession of the properties and enjoying the usufruct. After the decree of the High Court, dated 11th November, 1946, in Second Appeal No. 100 of 1943 the appellant made an application for restitution in the Court of the Additional Munsif in Miscellaneous Judicial Case No. 34 of 1947. The plaintiff obtained a stay of the hearing of the Miscellaneous Judicial Case from the Court of the Additional District Judge but on 30th March, 1948, the order of stay was discharged. In Civil Revision No. 75 of 1948 the High Court also granted interim stay in the proceedings in the Miscellaneous Judicial Case at the instance of the plaintiff but the order of stay was vacated by the High Court on 28th April, 1949. Thereafter the present appellant got the Miscellaneous Judicial Case stayed till disposal of his Second Appeal after remand. On 12th July, 1956, the Miscellaneous Judicial Case was allowed by the Munsif and an order of restitution was made in favour of the appellant. The respondents filed an appeal before the Subordinate Judge of Berhampur who allowed the appeal and set aside the order of restitution. The appellant took the matter before the High Court in Miscellaneous Appeal No. 24 of 1958 which was allowed by P.V. Balakrishna Rao, J., on 3rd October, 1958 and it was ordered that the restitution of the properties should be made to the appellant subject to the condition that he must deposit the amount decreed in favour of the plaintiff-decree-holder. The order of the learned Single Judge was.

however, set aside in Letters Patent Appeal by a Division Bench which held that the appellant was not entitled to restitution of properties sold in the execution case.

The question presented for determination in this case is whether the appellant was entitled to restitution of his properties purchased by judgment-creditor in execution of the decree passed by the District Judge on the ground that the decree was set aside by the High Court and the suit was remanded for re-hearing and fresh disposal under the provisions of section 144 of the Civil Procedure Code which states as follows :

“ 144. (1) Where and in so far as a decree or order is varied or reversed, the Court of first instance, shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed ; and for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.”

On behalf of the respondents Mr. Agarwala made the submission that after the suit was re-heard a decree was passed in favour of the respondents and that decree was eventually affirmed by the High Court, and the appellant was, therefore, not entitled to restitution under the provisions of this section. We are unable to accept this argument as correct. The properties of the appellant were sold in execution at the instance of the respondents who were executing the *ex parte* decree passed by the District Judge on 9th March, 1943. In this execution case, the properties of the appellant were sold and the respondents got delivery of possession on 17th May, 1946. It is true that the suit was eventually decreed after remand on 27th August, 1954, by judgment of the High Court, but we are unable to accept the argument of the respondents that the execution sale held under the previous *ex parte* decree which was set aside by the High Court is validated by the passing of the subsequent decree and therefore the appellant is not entitled to any restitution. It is evident that the application for restitution was filed by the appellant in 1947 in Miscellaneous Judicial Case No. 34 of 1947 before the passing of a fresh decree by the High Court in the Second Appeal. At the time of the application for restitution, therefore, the appellant was entitled to restitution, because on that date the decree in execution of which the properties were sold had been set aside. We are of the opinion that the appellant is entitled to restitution notwithstanding anything which happened subsequently as the right to claim restitution is based upon the existence or otherwise of a decree in favour of the plaintiff at the time when the application for restitution was made. The principle of the doctrine of restitution is that on the reversal of a decree, the law imposes an obligation on the party to the suit who received the benefit of the erroneous decree to make restitution to the other party for what he has lost. This obligation arises automatically on the reversal or modification of the decree and necessarily carries with it the right to restitution of all that has been done under the erroneous decree; and the Court in making restitution is bound to restore the parties, so far as they can be restored, to the same position they were in at the time when the Court by its erroneous action had displaced them from. It should be noticed, in the present case, that the properties were purchased by the decree-holder himself in execution of the *ex parte* decree and not by a stranger auction-purchaser. After the *ex parte* decree was set aside in appeal and after a fresh decree was passed on remand, the sale held in execution of the *ex parte* decree becomes invalid and the decree-holder who purchased the properties in execution of the invalid decree is bound to restore to the judgment-debtor what he had gained under the decree which was subsequently set aside. The view that we have expressed is borne out by the decision of the Judicial Committee in *Zain-ul-Abdin Khan v. Muhammad Asghar Ali Khan*¹, in which a suit was brought by the judgment-debtor to set aside the sale of his property in execution of the decree against him in force at the time of the sales, but afterwards so modified, as the result of an appeal to Her Majesty in Council, that, as it finally stood, it would have been satisfied without the sales in question having taken place. The judgment-debtor sued both those

who were purchasers at some of the sales, being also holders of the decree to satisfy which the sales took place, and those who were *bona fide* purchasers at other sales, under the same decree, who were no parties to it. The Judicial Committee held that, as against the latter purchasers, whose position was different from that of the decree-holding purchasers, the suit must be dismissed. At page 172 of the Report Sir B. Peacock observed as follows :

"It appears to their Lordships that there is a great distinction between the decree-holders who came in and purchased under their own decree, which was afterwards reversed on appeal, and the *bona fide* purchasers who came in and bought at the sale in execution of the decree to which they were no parties, and at a time when that decree was a valid decree, and when the order for the sale was a valid order."

The same principle has been laid down by the Calcutta High Court in *Set Umedmal and another v. Srinath Ray and another*¹, where certain immovable properties were sold in execution of an *ex parte* decree and were purchased by the decree-holder himself. After the confirmation of the sale, the decree was set aside under section 108 of the Civil Procedure Code, 1882 at the instance of some of the defendants in the original suit. On an application under section 224 of the Civil Procedure Code, 1882, having been made by a prior purchaser of the said properties in execution of another decree, to set aside the sale held in execution of the *ex parte* decree the defence was that the application could not come under section 244 of the Civil Procedure Code, 1882, and that the sale could not be set aside, as it had been confirmed. It was held by the Calcutta High Court the *ex parte* decree having been set aside the sale could not stand, inasmuch as the decree-holder himself was the purchaser. At page 813 Maclean, C.J., stated :

"As regards the second point, *viz.*, whether, notwithstanding the confirmation, the sale ought to be set aside, the fact that the decree-holder is himself the auction-purchaser is an element of considerable importance. The distinction between the case of the decree-holder and of a third party being the auction-purchaser is pointed out by their Lordships of the Judicial Committee in the case of *Nawab Zainalabdin Khan v. Mahomed Asghar Ali*² and also in the case of *Mina Kumari Bibee v. Jagat Sallani Bibee*³ which is a clear authority for the proposition that where the decree-holder is himself the auction-purchaser, the sale cannot stand, if the decree be subsequently set aside. I am not aware that this decision which was given in 1883, has since been impugned.

The same view has been expressed in *Raghu Nandan Singh v. Jagdis Singh*⁴, where it was held that if an *ex parte* decree has been set aside, it cannot by any subsequent proceeding be revived and if a decree is passed against judgment-debtors on rehearing, it is a new decree and does not revive the former decree. The same opinion has been expressed in *Abdul Rahaman v. Sarafat Ali*⁵, in which it was pointed out that as soon as an *ex parte* decree was set aside, the sale, where the decree-holder was the purchaser, falls through and was not validated by a fresh decree subsequently made. The same principle was reiterated by the Bombay High Court in *Shivbai Kom Babya Swami v. Yesoo*⁶. In that case, an *ex parte* decree was passed against the defendant, in execution of which the defendant's house was sold and purchased by the plaintiff-decree-holder. The *ex parte* decree was subsequently set aside ; but at the re-trial, a decree was again passed in plaintiff's favour. In the meanwhile the defendant applied to have the sale of the house set aside. It was held, in these circumstances, by the Bombay High Court that the previous sale of the house in execution under the previous decree which had been set aside should itself be set aside as being no longer based on any solid foundation; but subject in all the circumstances to the condition that the defendant should pay up the amount due under the second decree within a specified time.

On behalf of the respondents reference was made to the decision of this Court in *Lal Bhagwant Singh v. Rai Sahib Lala Sri Kishen Das*⁷. But the ratio of that case has no application to the present case. It should be noticed that the decree in that case was affirmed at all stages of the litigation except that the amount of the

1. I.L.R. (1900) 27 Cal. 810.

2. I.L.R. (1888) 10 All. 166.

3. I.L.R. (1884) 10 Cal. 220.

4. (1910) 14 C.W.N. 182.

5. (1916) 20 C.W.N. 667.

6. I.L.R. (1919) 43 Bom. 235.

7. (1953) S.C.J. 188 : (1953) S.C.R. 559 : A.I.R. 1953 S.C. 136.

decree was slightly altered from Rs. 3,88,300 and odd to Rs. 3,76,790 and odd which amount was ultimately decreed by the Privy Council in the appeal which the judgment-debtor preferred from the decision of the Oudh Chief Court which restored the decree of the Trial Judge who decreed a sum of Rs. 3,88,300. It was held by this Court that the Privy Council had merely restored the amended decree without altering the provisions as to payment by instalments or extending the time for payment by instalments and its decree did not in any way alter the position of the parties as it stood under the amended decree, and, the sale was not in consequence of any error in a decree which was reversed on appeal by the Privy Council and so the judgment-debtor was not entitled to restitution. In the present case the material facts are manifestly very different.

For the reasons expressed, we are satisfied that the appellant is entitled to restitution of the properties sold in execution of the *ex parte* decree subject to equities to be adjusted in favour of the respondent-decree-holders. We order that the appellant should be restored back to possession of the properties sold in the execution case subject to the condition that he deposits the amount of Rs. 970 in the Court of the Munsif, Aska within two months from this date. If no deposit is made within this time this appeal will stand dismissed with costs. But if the appellant makes the deposit within the time allowed the sale of the properties in the execution case will be set aside and the respondents will make over the possession of the properties sold to the appellant. The appellant will not be entitled to any past mesne profits but if the respondents do not deliver the possession of the properties the appellant will be entitled to the future mesne profits from the respondents from the date of deposit till the actual date of delivery of possession. Learned Counsel for the appellant has informed us that the deposit has already been made by the appellant in pursuance of the order of the learned Single Judge of the High Court, dated 3rd October, 1958. If the deposit has already been made the appellant will be entitled to take possession of the properties through the executing Court and to future mesne profits from the date of this judgment till the actual date of delivery of possession.

We accordingly allow the appeal to the extent indicated above. In the circumstances of the case we do not propose to make any order as to costs.

V.K.

*Appeal allowed ;
Restoration of property ordered on terms.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. Hidayatullah, V. RAMASWAMI AND P. SATYANARAYANA RAJU, JJ.

Shitla Sahai Srivastava

... *Appellant**

v.

The General Manager, North-Eastern Railway, Gorakhpur

.. *Respondent.*

Constitution of India (1950), Article 311—Government servant's name included in the panel for promotion to next higher post—Such inclusion stated to be provisional—Subsequent removal of the name of the Government servant from the panel—If amounts to "reduction in rank".

The appellant who was holding the substantive post of Travelling Ticket Examiner was, after a written examination and *viva voce* test, included in the panel for promotion to the post of Travelling Ticket Inspector. The panel was published in the official gazette but a note was appended to the notification that the selection of the appellant was provisional. Subsequently the appellant's name was removed from the panel. The appellant claimed that the deletion of his name from the panel amounted to reduction in rank and that therefore the order was bad in law as he was not given an opportunity to defend himself, as required by Article 311 of the Constitution of India, before his name was removed.

Held, the word 'provisional' was specifically noted against the name of the appellant which clearly showed that he did not acquire a right to the post of Travelling Ticket Inspector. The deletion of his name from the panel therefore did not attract the provisions of Article 311 of the Constitution of India. If a civil servant has a right to a particular rank, then the very reduction from the rank will operate as a penalty, for he will then lose the emoluments and privileges of that rank. If, however, he has no right to the particular rank, his reduction from that rank to his substantive lower rank will not ordinarily be a punishment.

Dineshwar v. Chief Commercial Superintendent, A.I.R. 1960 Cal. 209, disapproved.

Appeal by Special Leave from the Judgment and Order, dated the 19th September, 1963, of the Allahabad High Court in Special Appeal No. 268 of 1963.

S. P. Sinha, Senior Advocate (*Shaukat Husain*, Advocate, with him), for Appellant.

Niren De, Additional Solicitor-General of India (*K. S. Chawla* and *R. H. Dhebar*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Satyanarayana Raju, J.—This appeal by Special Leave, is against the judgment of a Division Bench, of the Allahabad High Court which affirmed the judgment of a Single Judge of that Court. The facts giving rise to this appeal may be shortly stated as follows:

The appellant had been in the service of North-Eastern Railway holding the substantive post of Travelling Ticket Examiner. The post of Travelling Ticket Inspector, which is the next higher post, is a selection post. Selection is made by a Selection Board in accordance with the Promotion and Selection Rules (Non-Gazetted) framed under paragraph 158 of the Indian Railway Establishment Code, Volume I (hereinafter referred to as the Rules). Every year, an assessment of the number of vacancies that are likely to occur during that year is made. The Chief Commercial Superintendent is the appointing authority for the post of Ticket Inspectors. In accordance with rule 8 (7), eligible staff, up to four times the number of anticipated vacancies, shall be called up for written and *viva voce* tests. After the examination and the interview, the Board prepares a panel and promotions are made from the said panel.

In the year 1959, a Selection Board for preparing a panel for the ex-Muzaffarpur region was constituted. There were, during that year, eight existing vacancies which were to be filled up immediately. In addition, a panel of six was required to be drawn up. It was also expected that there would be nine more vacancies on account of upgrading of posts but this did not actually materialise. But, due to an incorrect assessment of the anticipated number of vacancies, 92 persons were called up for examination, whereas 56 persons should have been called up for written and *viva voce* tests.

There was a written examination on 22nd February, 1959 and 31st March, 1959, and thereafter the Selection Board interviewed the candidates. As a result of the examination and the *viva voce* test, the Selection Board prepared a panel of fourteen persons and the appellant was given the twelfth rank in the panel. He was posted as Officiating Travelling Ticket Inspector on or about 28th July, 1960. The final list of persons brought on the panel was published in the Railway Gazette on 1st January, 1961 and the appellant was shown at serial No. 13 in that panel. But a note was appended to the notification stating that the selection of the appellant and five others was provisional.

By a letter, dated 29th September, 1961, the Chief Commercial Superintendent, North-Eastern Railway, Gorakhpur, under the orders of the General Manager, the prescribed authority, deleted the name of the appellant and five others who were shown at serial Nos. 9 to 14 in the panel.

On 28th November, 1961, the appellant filed a petition under Article 226 of the Constitution for the issue of a writ of *certiorari*, impugning the validity of the order, dated 29th September, 1961, in and by which his name had been removed

from the panel. He contended that the deletion of his name from the indefinitely postponed his right of promotion and therefore amounted to a reduction in rank.

The respondents contested the petition. They averred that the name of the appellant was deleted from the panel in accordance with Rules, that he had a subsisting right to the post only by reason of the fact that his name was included in the panel, that the appellant and five other persons were called up for examination on an incorrect assessment of the number of vacancies. It was also contended by the respondents that the provisions of Article 311 were not attracted.

By judgment, dated 14th March, 1963, the learned Single Judge dismissed the writ petition filed by the appellant. He held that the deletion of the appellant's name from the panel did not amount to reduction in rank under Article 311, that therefore he was not entitled to the notice prescribed by that Article. The learned Judge also held that the appellant had not established that the decision of the respondent amounted to a violation of any Constitutional provision or statutory rule.

The appellant preferred an appeal which was summarily dismissed by a Division Bench. An application for leave to appeal to this Court was also rejected. Thereupon, the appellant obtained Special Leave from this Court.

In support of the appeal, it is contended for the appellant by Mr. S. P. S. that the deletion of the appellant's name from the panel amounted to a reduction in rank and that the order was bad in law for the reason that the appellant was not given an opportunity to explain or defend himself before his name was deleted from the panel. Now, as has been explained by this Court in *Parshotam Lal Dhingra v. The Union of India*¹, the expressions 'dismissal', 'removal' or 'reduction in rank' are technical words taken from the Service Rules where they are used to denote three major categories of punishments.

The question for determination is whether the deletion of the appellant's name from the panel amounts to a reduction in rank within the meaning of Article 311. Mention has already been made of the fact that the panel was prepared in accordance with the Rules. Rule 8 lays down the procedure to be followed by the Selection Committee. Sub-rule (7) of that rule reads :

"Eligible staff up to 4 times the number of anticipated vacancies as defined below shall be called for written and/or *viva voce* test....."

Under the above rule, eligible staff up to four times the number of anticipated vacancies should be called for written and *viva voce* test. The vacancies to be filled up were 8 and in addition a panel of 6 was required to be drawn up; thus for a total of 14 persons to be included in the panel, 56 eligible staff were to be called. On account of an incorrect assessment of the anticipated vacancies, 92 persons were called to take the promotion examination. The appellant's number in the eligible staff was after 56 and, but for the mistake, he would not have been called for the examination.

Rule 11 provides that panels for selection posts framed by a duly constituted Selection Board and approved by the competent authority shall not be cancelled or amended without reference to an authority next above the one that approved the panel. Now, the panel was prepared by the Chief Commercial Superintendent, Gorakhpur, who was subordinate to the General Manager, North-Eastern Railway. The panel, as originally drawn, was subsequently amended by the Chief Commercial Superintendent under instructions from the General Manager. This was in accordance with rule 11.

In the final list of the personnel included in the panel, the names of Sahai and Ramanand were included. The name of the first of them was included by reason of the fact that his marks were not correctly totalled up and the second was included

by reason of the fact that he belonged to the Scheduled Caste. The complaint made by the appellant is that by reason of the inclusion of the said two persons in the final panel of Travelling Ticket Inspectors there was no post in which he could be kept and he was therefore reverted till another vacancy occurred, that by reason of the deletion of his name from the panel it would be necessary for him to appear before another Selection Board and until his name was again brought into the panel he would have no chance of being promoted to the post of Travelling Ticket Inspector.

It is to be noted that in the panel prepared by the Selection Board the word 'provisional' was specifically noted against the name of the appellant which clearly shows that he did not acquire a right to the post. The deletion of his name from the panel therefore does not attract the provisions of Article 311. If a civil servant has a right to a particular rank, then the very reduction from that rank, will operate as a penalty, for he will then lose the emoluments and privileges of that rank. If, however, he has no right to the particular rank, his reduction from an officiating higher rank to his substantive lower rank will not ordinarily be a punishment: vide *Dhingra's ease*¹. It is no doubt true that in the said case it has been held that when reversion entails penal consequences, it would be reduction in rank, but the instant case is not one in which penal consequences have been visited on the appellant.

Learned Counsel for the appellant has relied upon the decision of a Single Judge of the High Court of Calcutta as supporting his contention that the deletion of the appellant's name from the panel would amount to a reduction in rank. That decision is reported as *Dineshwar v. Chief Commercial Superintendent, Eastern Railway*². At page 211, the learned Judge observed :

"The question is whether the striking of the petitioner's name from the panel, has affected his future right of promotion. In my opinion, the inescapable conclusion is that it has so affected the petitioner. As I have mentioned above, promotion from Class III post to a Class II post is to be done according to the recommendations made by Selection Boards. Where there is such a list or a panel, then a person not in the list cannot hope to be promoted. . . . It is implied, that in order to have a chance of promotion, the petitioner would have to be in the selection list, that is to say, in the panel. . . . But with regard to the second contention, viz., that the striking out of his name from the panel affected his chances of future promotion, it is a point of substance and must be upheld. What the authorities should have done before striking out the name of the petitioner from the panel was, to give him an opportunity of showing cause as to why his name should not be struck off from the panel and the order could only be made after giving the petitioner an opportunity of being heard."

We are of opinion that this is not a correct statement of the law, in view of the decision of this Court in *High Court, Calcutta v. Amal Kumar Roy*³. There the facts were these. The respondent was a Munsif in the West Bengal Civil Service (Judicial). When the cases of several Munsifs came up for consideration before the High Court for inclusion of names in the panel of officers to officiate as Subordinate Judges, the respondent's name was excluded. He was told by the Registrar of the Court, on a representation made by him, that the Court had decided to consider his case after a year. As the result of such exclusion, the respondent, who was then the seniormost in the list of Munsifs, lost eight places in the cadre of Subordinate Judges before he was actually appointed to act as an Additional Subordinate Judge. He filed a suit praying that a declaration might be made that he occupied the same position in respect of seniority in the cadre of Subordinate Judges as he would have done if no supersession had taken place. His case, in substance, was that as a result of the High Court's order he was reduced by eight places in the list of Subordinate Judges, and that in law amounted to reduction in rank within the meaning of Article 311 (2) of the Constitution. This Court held at page 453 as follows :

"In our opinion, there is no substance in this contention because losing places in the same cadre, namely, of Subordinate Judges does not amount to reduction in rank, within the meaning of Article 311 (2). The plaintiff sought to argue that 'rank', in accordance with dictionary meaning, signifies 'relative position or status or place', according to Oxford English Dictionary. The word 'rank' can be

1. (1958) S.G.J. 217 : (1958) S.C.R. 828 : 3. (1963) 1 S.C.R. 437 : A.I.R. 1962 S.C. A.I.R. 1958 S.C. 36. 1704.
2. A.I.R. 1960 Cal. 209.

and has been used in different senses in different contexts. The expression 'rank' in Article 311 (2) has reference to a person's classification and not his particular place in the same cadre in the hierarchy of the service to which he belongs. Hence, in the context of the Judicial Service of West Bengal, 'reduction in rank' would imply that a person who is already holding the post of a Subordinate Judge has been reduced to the position of a Munsif, the rank of a Subordinate Judge being higher than that of a Munsif. But Subordinate Judges in the same cadre hold the same rank, though they have to be listed in order of seniority in the Civil List. Therefore, losing some places in the seniority list is not tantamount to reduction in rank. Hence, it must be held that the provisions of Article 311 (2) of the Constitution are not attracted to this case."

This decision has established the following principle, *viz.*, the expression 'rank' in Article 311 (2) has reference to a person's classification and not his particular place in the same cadre in the hierarchy of the service to which he belongs and therefore losing some places in the seniority list is not tantamount to reduction in rank within the meaning of Article 311 (2) of the Constitution.

It is perhaps true that the hopes of the appellant were raised by reason of the inclusion of his name in the panel. It is also true that the respondent made an incorrect assessment of the anticipated number of vacancies, but the fact remains that his inclusion in the panel was expressly stated to be provisional. The appellant cannot therefore complain of any infraction of the guarantee given by the Constitution to Government servants.

The appeal fails and is dismissed. In all the circumstances of the case, there will be no order as to costs.

V.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, J. C. SHAH AND S. M. SIKRI, JJ.

Master Construction Co. (P.) Ltd.

*Appellant**

v.

The State of Orissa and another

Respondents.

Constitution of India (1950), Article 136—Party who has not exhausted all his other remedies—If can invoke Article 136.

Orissa Sales Tax Rules (1947), rule 83—Scope of jurisdiction of Commissioner of Sales Tax under.

Article 136 of the Constitution of India confers a discretionary appellate jurisdiction on the Supreme Court against any order passed by any Tribunal in the territory of India. The said jurisdiction is not subject to any condition that the party who seeks Special Leave to appeal to the Supreme Court from such order, should exhaust all his other remedies. The existence of a statutory remedy to such a party however, may persuade the Supreme Court not to give leave to appeal to the party.

An appeal filed under Article 136 of the Constitution of India, from an order of the Commissioner of Sales Tax in revision, under the Orissa Sales Tax Act, 1947 (which does not provide for a further remedy against such order of the Commissioner), cannot be thrown out on the ground that the appellant had not exhausted his remedy under Article 226 of the Constitution of India, as the High Court's jurisdiction under Article 226 is discretionary and the scope of the jurisdiction is rather limited.

Rule 83 of the Orissa Sales Tax Rules, 1947, provides a summary remedy within a narrow compass. The jurisdiction of the Commissioner of Sales Tax under this rule is limited and is confined only to the correction of arithmetical or clerical mistakes or any error apparent on the face of the record arising or occurring from accidental slip or omission in an order passed by him. An arithmetical mistake is a mistake of calculation; a clerical mistake is a mistake in writing or typing. An error arising out of or occurring from an accidental slip or omission is an error due to a careless mistake or omission unintentionally made. There is another qualification, namely, such an error shall be apparent on the face of the record, that is to say, it is not an error which depends for its discovery, on elaborate arguments on questions of fact or law. The accidental slip or omission is an accidental slip or omission made by the Court. The obvious instance is a slip or omission to embody in the order something which the Court in fact ordered to be done. This is sometimes described as a clerical order not being in accordance with the judgment. But the slip or omission may be attributed to the Judge himself. He

may say something or omit to say something which he did not intend to say or omit. This is described as a slip or omission in the judgment itself. But, however wide the said expressions are construed, they cannot countenance a re-argument on merits on questions of fact or law, or permit a party to raise new arguments which he has not advanced at the first instance. That is the scope of rule 83.

Where an order for refund of sales tax recovered from an assessee, is made by the Commissioner of Sales Tax erroneously, because the Department had not raised before him arguable questions of limitation and construction of documents, the wrong conclusion arrived at by the Commissioner cannot be said to be an error arising or accruing from an accidental slip or omission. Nor can it be considered as an error apparent on the face of the record for the decision depends upon considerations of arguable questions of fact and law. In such a case, the Commissioner has no power, under rule 83 of the Orissa Sales Tax Rules, to re-hear arguments on those questions which were not raised before him in the first instance, and come to a conclusion different from which he arrived on the earlier occasion.

Appeal by Special Leave from the Order, dated the 24th September, 1963, of the Commissioner of Sales Tax, Orissa, at Cuttack, made under rule 83 of the Orissa Sales Tax Rules, 1947.

A. V. Viswanatha Sastry, Senior Advocate (*B. P. Maheshwari*, Advocate, with him), for Appellant.

V. D. Mahajan and *R. N. Sachthey*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Subba Rao, J.—This appeal, by Special Leave, raises the scope of the jurisdiction of the Commissioner of Sales Tax under rule 83 of the Orissa Sales Tax Rules, 1947.

The facts may be briefly stated. The appellant is a private limited company carrying on business mainly as building contractors in the State of Orissa. He was a registered dealer under the provisions of the Orissa Sales Tax Act, 1947, hereinafter called the Act. He was assessed to sales tax under section 12, sub-section (4) of the Act in respect of all quarters ending on and in between 30th June, 1949 to 31st March, 1954. He was also assessed to sales tax under section 12, sub-section (8) of the Act in respect of all quarters ending on and between the dates 30th September, 1949 to 31st March, 1950. Towards the said assessment, between 6th December, 1950 to June, 1954, he paid by way of sales tax sums amounting to Rs. 53,220-14-0. On 27th August, 1954, on the basis of the decision of the Supreme Court in the case of *State of Madras v. Gannon Dunkerley & Co.*¹, the appellant filed a petition in the High Court of Orissa under Article 226 of the Constitution of India for a writ of *certiorari* to quash the said assessments. On 22nd April, 1958, the said High Court quashed the said assessments and directed refund of that portion of the tax which was not barred by limitation on the date of the filing of the said application. On 9th July, 1958 the appellant filed an application before the Sales Tax Officer for the refund of the amounts payable to him in view of the said decision. On 15th May, 1961, the Sales Tax Officer while holding that the appellant was entitled to the refund of the amounts paid by him, rejected his application on the ground that it was filed only by one of the directors whereas it should have been filed jointly by all the parties. On 5th May, 1962, the Commissioner of Sales Tax, respondent No. 2 in this appeal, in a revision filed against the said order, set aside the order of the Sales Tax Officer and held that the appellant was entitled to the refund applied for and directed the said Officer to issue refund payment orders as early as possible. On 5th January, 1963, the said Commissioner issued a notice to the appellant under rule 83 of the said Rules calling upon him to show cause why the order dated 15th May, 1962, should not be reviewed. On 24th September, 1963, the said Commissioner reviewed his previous order and held that the appellant would be entitled to refund of the taxes paid subject to the disallowances made in his order. Hence the present appeal.

Mr. Mahajan, the learned Counsel for the respondents, raised a preliminary objection to the maintainability of the appeal on the ground that the appellant could

1. (1958) 2 M.L.J. (S.C.) 66 : (1958) 2 An. S.C.R. 379 : A.I.R. 1958 S.C. 560.
W.R. (S.C.) 66 : (1958) S.C.J. 696 : (1959)

not file the appeal unless it had exhausted the remedy under Article 226 of the Constitution of India. There are no merits in this contention. Article 136 confers a discretionary appellate jurisdiction on this Court against any order passed by any Tribunal in the territory of India. The said jurisdiction is not subject to any condition that the party who seeks Special Leave of this Court to appeal from such order, to exhaust all his other remedies. The existence of a statutory remedy to such a party may persuade this Court not to give leave to appeal to the party. In the present case, the Act does not provide for a further remedy against the order made by the Commissioner in revision. Under Article 226 of the Constitution of India, the High Court's jurisdiction is discretionary and the scope of the jurisdiction, in view of the decisions of this Court, is rather limited. In the circumstances, we do not see any justification to throw out this appeal on the ground that the appellant has not exhausted all his remedies.

On the merits, Mr. Viswanatha Sastry appearing for the appellant, raised before us two points : (1) Under rule 83 of the Rules the jurisdiction of the Commissioner is very limited in that he can only correct arithmetical and clerical mistakes and errors apparent on the face of the record arising from an accidental slip or omission. But the Commissioner in the instant case, practically re-heard the revision and came to a conclusion different from that which he had arrived on the earlier occasion. (2) The conclusions arrived at by the Commissioner are not correct both on law and on facts.

Mr. Mahajan contended that the order made by the Commissioner was within the scope of his jurisdiction for he had only reviewed the previous order in respect of the amounts not paid by the appellant to the Sales Tax authorities and in respect of those amounts directed to be repaid under a misapprehension that the said amounts were the subject-matter of the appeals against the orders of assessment, and the application in respect thereof was within time.

Mr. Mahajan attempted to take us through the particulars and details of such payments, but we did not permit him to do so as nothing would turn upon the said details to show whether the Commissioner had jurisdiction or not in reviewing his own order. If he had not, the fact that his order was not correct on facts would be quite irrelevant for the disposal of this appeal.

The material part of rule 83 of the said Rules reads :

"The Commissioner of Sales Tax.....may at any time correct any arithmetical or clerical mistakes or any error apparent on the face of the record arising or occurring from accidental slip or omission in an order passed by him, or it."

Rule 83 provides a summary remedy within a narrow compass. The jurisdiction of the Commissioner under this rule is limited and is confined only to the correction of mistakes or omissions mentioned therein. An arithmetical mistake is a mistake of calculation; a clerical mistake is a mistake in writing or typing. An error arising out of or occurring from an accidental slip or omission is an error due to a careless mistake or omission unintentionally made. There is another qualification, namely, such an error shall be apparent on the face of the record, that is to say, it is not an error which depends for its discovery, on elaborate arguments on questions of fact or law. The accidental slip or omission is an accidental slip or omission made by the Court. The obvious instance is a slip or omission to embody in the order something which the Court in fact ordered to be done. This is sometimes described as a decretal order not being in accordance with the judgment. But the slip or omission may be attributed to the Judge himself. He may say something or omit to say something which he did not intend to say or omit. This is described as a slip or omission in the judgment itself. The cause for such a slip or omission may be the Judge's inadvertence or the Advocate's mistake. But, however wide the said expressions are construed, they cannot countenance a re-argument on merits on questions of fact or law, or permit a party to raise new arguments which he has not advanced at the first instance. If that was the scope of rule 83, the question is, whether the Commissioner's order is within its scope.

On 15th May, 1961, the Sales Tax Officer dismissed the application filed by the dealer for refund. Though he held that the appellant was entitled for refund, he dismissed the application on the ground that it was signed only by one of the directors. In the appeal filed by the appellant against the said order to the Commissioner, the Commissioner by his order dated 15th May, 1962, came to the conclusion that the appellant was entitled to the refund applied for and the Sales Tax Officer went wrong in rejecting the said application for refund. A perusal of the order shows that the Commissioner had looked into the connected assessment record and came to the conclusion that, in view of the Supreme Court judgment and the order made by the Sales Tax Tribunal, Orissa, the appellant was entitled to the refund. But, in his order dated 24th September, 1963, he practically re-heard the entire matter both on facts and on law and came to the conclusion that a part of the money, directed to be refunded by his earlier order, should not be refunded. He has dealt with five items. Item (a) relates to the assessment for the quarters ending 30th September, 1949 made under section 12 (1) of the Act and the assessment made under section 12 (7) for the quarters ending 31st December, 1949 to 31st March, 1950. He made a distinction between assessments made under section 12 (1) and section 12 (7) of the Orissa Sales Tax Act and held the period of limitation would commence from the date of the orders made thereunder respectively. So holding, he came to the conclusion that the assessments under section 12 (7) were made final by November, 1951; and an application for refund of the said amounts covered by the said assessments was barred by limitation. In respect of assessments made under section 12 (1), except in regard to Rs. 299-11-0, he held the claim was barred by limitation. In regard to item (b), as it is a clear mistake, the learned Counsel for the assessee conceded both in the Court below and before us that the amount covered by that item may be disallowed. Item (c) relates to the assessments made for the quarters ending 31st March, 1952, 30th June, 1953, 30th September, 1953, 13th December, 1953 and 13th February, 1954. Those assessments were set aside by the first appellate authority by its order dated 28th May, 1958. But the Commissioner held that the admitted tax paid before the orders of assessment was not the subject-matter of appeals and therefore the amount paid towards the admitted tax was not refundable. The contention of the assessee was that as the appellate authority had set aside the entire assessment, the assessee would be entitled to a refund of the entire tax, whether paid before or after the order of assessment.

Item (d) relates to the assessment for the quarters ending 30th September, 1950 to 31st December, 1951 and 30th June, 1952 to 31st March, 1953 (10 quarters excepting quarter ending 31st March, 1952). On the same reasoning adopted by the Commissioner in respect of item (c), he held that, in regard to the amounts paid before the assessment the assessee was not entitled to a refund of the same. On behalf of the assessee, it was contended that as the assessment orders were set aside he was entitled to refund of the amounts whether paid before or after the orders setting aside the assessments. Item (e) relates to refund of taxes paid in respect of Puri II and Cuttack II Circles. That part of the order was not questioned before us.

It is therefore clear that the Commissioner reviewed his previous order which was passed on merits mainly on two grounds: (i) that the application for refund in respect of certain amounts was barred by limitation; and (ii) the assessee was not entitled to a refund of the amounts paid before the assessment orders were made on the ground that the said amounts were not the subject-matter of the appeals wherein the assessments were set aside. Both the question of limitation as well as the question of construction of the appellate orders and the impact of those orders on the amounts paid towards tax before the assessments were arguable questions of fact and law. The Department should have raised the said questions before the Commissioner at the time he first made the order directing refund of the amounts claimed by the assessee. The wrong conclusion, if any, arrived at by the Commissioner in his earlier order, because of the fact that the said two arguments were not advanced before him, cannot be said to be errors apparent on the face of the record.

arising or accruing from an accidental slip or omission. The errors, if any, arose because the Department did not raise those points before the Commissioner. They were also errors not apparent on the face of the record for the decision depends upon consideration of arguable questions of limitation and construction of documents. Indeed the Commissioner re-heard arguments and came to a conclusion different from that which he arrived on the earlier occasion. This is not permissible under rule 83 of the Rules.

In this view, it is unnecessary to consider the argument advanced by Mr. Sastry that the application for refund was not barred by limitation as the final orders in regard to the assessments was made by the Tribunal only in the year 1958.

In the result, the order of the Commissioner is set aside, except in regard to items (b) and (e) mentioned in paragraph 7 of his order. In the circumstances, there will be no order as to costs.

V.K.

Order accordingly.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, *Chief Justice*, J. C. SHAH, S. M. SIKRI, V. RAMASWAMI AND C. A. VAIDIALINGAM, JJ.

The State of Uttar Pradesh

.. *Appellant**

v.

Madan Mohan Nagar

.. *Respondent.*

Civil Service Regulations (as amended by Uttar Pradesh Government), Article 465-A read with Note (1)—Order of compulsory retirement—If amounts to dismissal—Test.

Constitution of India (1950), Article 311—Applicability.

An order of compulsory retirement under Article 465-A and Note (1) thereof, of the Civil Service Regulations (as amended by the Uttar Pradesh Government) which clearly states that the officer concerned 'has outlived his utility', clearly attaches a stigma to him and any person who reads the order would immediately consider that there is something wrong with him or his capacity to work. In the circumstances the order of compulsory retirement must be held to be an order of dismissal and not a mere order of discharge. The test to decide whether the order is one of mere discharge or amounts to dismissal is to find out whether the order of compulsory retirement cast an aspersion or attach a stigma to the officer when it purports to retire him compulsorily. Where a stigma is attached the order would be a punitive order.

Abdul Ahmad v. The Inspector-General of Police, U.P., A.I.R. 1965 All. 142 (F.B.), overruled.

The question whether Article 465-A, Note (1) violates Article 311 of the Constitution was not argued and therefore left open.

Appeal by Special Leave from the Judgment and Order, dated the 25th July, 1963, of the Allahabad High Court in Special Appeal No. 431 of 1962.

S. V. Gupta, Solicitor-General of India and *C. B. Agarwala*, Senior Advocate, (*O. P. Rana*, Advocate, with them), for Appellant.

J. P. Goyal and *B. P. Jha*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Sikri, J.—The respondent, Shri Madan Mohan Nagar, filed a Writ Petition in the High Court of Judicature at Allahabad for quashing the order of compulsory retirement dated 28th July, 1960, passed against him. The order of compulsory retirement was in the following terms :

"I am directed to say that the Governor has been pleased to order in the public interest under Article 465-A and Note (1) thereof of the Civil Service Regulations, the compulsory retirement with effect from 1st September, 1960, of Sri Madan Mohan Nagar, Director, State Museum, Lucknow, who completed 52 years of age on 1st July, 1960, and 28 years and 3 months of qualifying service on 31st May, 1960, as he has outlived his utility."

The learned Single Judge who heard the Petition quashed the order on the ground that

"Rule 465 of the Civil Service Regulations as amended by the U.P. Government while providing a criterion for the guidance of Government when inflicting compulsory retirement on a Government servant nevertheless violates the guarantee of equality of opportunity in matters relating to employment under Article 16 (1) "

of the Constitution. He further held that the order inflicting compulsory retirement on the petitioner was invalid because it was passed in violation of the principles of natural justice.

The State appealed and the Division Bench on appeal upheld the order passed by the learned Single Judge on the ground that the order of compulsory retirement was passed in violation of the provisions of Article 311 of the Constitution and was, therefore, *ultra vires*. The State having obtained Special Leave, the appeal is now before us.

Before we deal with the arguments of the learned Counsel for the appellant, we may give a few facts and set out Article 465-A and Note (1) thereof of the Civil Service Regulations, as amended by the Government of Uttar Pradesh. The facts, in brief, are that the respondent was first appointed in 1931 on one year's probation to the post of Custodian, Sarnath Museum, Banaras, under the Archaeological Department of the Government of India. In 1939, he was posted to Mathura Museum as Curator, and he was appointed substantively to this post from 5th January, 1941. Later, he was appointed on the recommendation of the Provincial Public Service Commission as Curator of the State Museum, Lucknow, on a scale of pay Rs. 250 to Rs. 850. The post of Curator was upgraded to the post of Director, State Museum, Lucknow, in the U.P. Educational Service, Senior Scale, and the respondent was appointed to it. Thereafter the respondent continued in service as Director of State Museum, Lucknow, until he was compulsorily retired by the order of the Government, dated 28th July, 1960, which has already been set out above. It is common ground that no enquiry as contemplated by Article 311 (2) was held.

The relevant part of Article 465-A of the Civil Service Regulations is in the following terms :

"Government retains the right to retire any Government servant after he has completed 25 years qualifying service without giving any reasons, and no claim to special compensation on this account shall be entertained.

This right shall only be exercised by Government in the Administrative Department when it is in the public interest to dispense with the services of Government servant who has outlived his usefulness."

The learned Solicitor General, who appears on behalf of the appellant has urged that the fact that the impugned order of compulsory retirement states the reason for compulsory retirement, namely, that the respondent had outlived his utility does not lead to the conclusion that the order amounts to dismissal or removal because in every case of compulsory retirement it is implied that the person who is compulsorily retired had outlived his usefulness. He refers to *Shyam Lal v. The State of Uttar Pradesh*¹, and says that in that case it was implied that Shyam Lal was not fit to be retained in service. We are unable to read *Shyam Lal's case*¹ in that manner because the Court expressly said at p. 41, as follows :

"It is true that this power of compulsory retirement may be used when the authority exercising this power cannot substantiate the misconduct which may be the real cause for taking the action but what is important to note is that the direction in the last sentence in Note 1 to Article 465-A makes it abundantly clear that an imputation or charge is not in terms made a condition for the exercise of the power. In other words, a compulsory retirement has no stigma or implication of misbehaviour or incapacity."

In the present case there is not only no question of implication but a clear statement appears on the face of the order that the respondent had outlived his utility, in other words, it is stated that he was incapacitated from holding the post of Director,

1. (1954) 1 M.L.J. 730; (1954) S.C.J. 493 : (1955) 1 S.C.R. 26 : A.I.R. 1954 S.C. 369.

State Museum, Lucknow. The order clearly attaches a stigma to him and any person who reads the order would immediately consider that there is something wrong with him or his capacity to work.

In our opinion this case is covered by the principle applied in *Jagdish Mitter v. Union of India*¹.

It is true that that was a case of a temporary servant, but that does not matter. The order in that case reads as follows :

"Shri Jagdish Mitter, a temporary 2nd Division Clerk of this office having been found undesirable to be retained in Government service is hereby served with a month's notice of discharge with effect from 1st November, 1949."

Gajendragadkar, J., as he then was, speaking for the Court, said :

"No doubt the order purports to be one of discharge and as such can be referred to the power of the authority to terminate the temporary appointment with one month's notice. But it seems to us that when the order refers to the fact that the appellant was found undesirable to be retained in Government service, it expressly casts a stigma on the appellant and in that sense must be held to be an order of dismissal and not a mere order of discharge."

Later, he observed :

"It seems that anyone who reads the order in a reasonable way, would naturally conclude that the appellant was found to be undesirable and that must necessarily import an element of punishment which is the basis of the order and is its integral part. When an authority wants to terminate the services of a temporary servant, it can pass a simple order of discharge without casting any aspersion against the temporary servant or attaching any stigma to his character. As soon as it is shown that the order purports to cast an aspersion on the temporary servant, it would be idle to suggest that the order is a simple order of discharge. The test in such cases must be : does the order cast aspersion or attach stigma to the officer when it purports to discharge him ? If the answer, to this question is in the affirmative, then notwithstanding the form of the order, the termination of service must be held, in substance, to amount to dismissal."

It seems to us that the same test must apply in the case of compulsory retirement, namely: does the order of compulsory retirement cast an aspersion or attach a stigma to the officer when it purports to retire him compulsorily ? In the present case there is no doubt that the order does cast a stigma on the respondent.

Mr. Gupta relies on *T. G. Shivacharana Singh v. State of Mysore*². But this case does not assist him because it does not appear that the order in that case contained any stigma, and under Rule 285 of the Mysore Civil Service Rules, 1958, retirement could be effected if it was considered necessary in the public interest. There was no question of requiring that there should be a finding that the Government officer had outlived his utility.

In *Ram Parshad v. State of Punjab*³, no such question appears to have been argued. In para. 32 of the judgment Satyanarayana Raju, J., while considering the validity of Rule 27 of the Staff Rules, reproduced an extract from the judgment of this Court in *Moti Ram Deka v. N. E. Frontier Railway*⁴. We will presently consider the effect of the decision in *Deka's case*⁴.

In *Deka's case*⁴, Moti Ram Deka, who was a peon employed by the North East Frontier Railway, challenged the order of termination of his services under rule 148 of the Indian Railway Establishment Code on the ground that the said Rule was invalid. There were some other appellants before the Court who challenged the validity of rule 149 of the Railway Establishment Code. The question posed for decision by Gajendragadkar, J., at page 699 was: if the service of a permanent civil servant is terminated otherwise than by operation of the rule of superannuation, or the rule of compulsory retirement does such termination amount to removal under Article 311 (2) or not. The Court was thus not concerned with the question of compulsory retirement under a rule similar to Rule 465-A, Note (1) of the Uttar Pradesh Civil Service Regulations but it reviewed some cases dealing with compulsory retirement. Subba Rao, J., as he then was,

1. A.I.R. 1964 S.C. 449.

2. A.I.R. 1965 S.C. 280.

3. A.I.R. 1966 S.C. 1607.

4. (1964) 5 S.C.R. 682. A.I.R. 1965 S.C. 465.

who delivered a concurring judgment, also reviewed the cases, but he preferred to follow the principle laid down in *Parshotam Lal Dhingra v. Union of India*¹, in respect of permanent Government servants in preference to that accepted in *Shyam Lal's case*², and the subsequent decisions following it. But it is not necessary for us to resolve the conflict, if any, which exists between *Dhingra's case*¹ and *Shyam Lal's case*², because here we have an order which on the face of it casts a stigma on the respondent. It is true, as pointed out by Subba Rao, J., that in *Doshi's case* (*State of Bombay v. Saubhagchand M. Doshi*³, rule 165-A of the Bombay Civil Services Rules laid down that the right of compulsory retirement will not be exercised except when it is in the public interest to dispense with the further services of a Government servant such as on account of inefficiency or dishonesty, but in *Doshi's case*³, it does not appear that the order contained any aspersion that Doshi was inefficient or suffered from some other defect. What was challenged in that case was the validity of Rule 165-A of the Bombay Civil Service Rules, and it was held that it did not violate Article 311 (2) of the Constitution.

Similarly, in *Balakotaiah v. The Union of India*⁴, in rule 3 of the Railway Service (Safeguarding of National Security) Rules, 1949, dealing with compulsory retirement, the proviso provided that

"a member of the Railway Service shall not be retired or have his service so terminated unless the competent authority is satisfied that his retention in public service is prejudicial to national security, and unless where the competent authority is the Head of a Department, the prior approval of the Governor-General has been obtained".

In this case also it does not appear that the order terminating the services contained any stigma on the public servant concerned.

In *Dalip Singh v. State of Punjab*⁵, the order read as follows :

"His Highness the Rajpramukh is pleased to retire from service Sardar Dalip Singh, Inspector-General of Police, Pepsu (on leave) for administrative reasons with effect from the 18th August, 1950."

It was held that the order did not amount to dismissal or removal from service within the meaning of Article 311 (2) of the Constitution. The Court derived two tests from *Shyam Lal's case*², and formulated them as follows : the first is whether the action is by way of punishment and to find out that the Court said it was necessary that a charge or imputation against the officer is made the condition of the exercise of the power; the second is whether by compulsory retirement the officer is losing the benefit he has already earned as he does by dismissal or removal. If the test is applied in this case it is quite clear that the charge or imputation "that respondent had outlived his utility" was made the condition of the exercise of the power.

The learned Solicitor-General also brought to our notice the decision of the Full Bench of the Allahabad High Court in *Abdul Ahad v. Inspector General of Police, U.P.*⁶. The decision certainly helps him, and as a matter of fact, the Full Bench overruled the judgment of the Division Bench under appeal. But, with respect, we are unable to agree with the conclusion that even if the order of compulsory retirement recites the fact that the public servant had outlived his utility, it would not amount to a punitive order. The Full Bench was of the view that

"compulsory retirement will always be on the ground that he can no longer render useful service. The position certainly does not become worse because what is implied is expressed."

We are unable to agree that the position does not become worse because a stigma is attached expressly.

1. (1958) S.C.J. 217 : (1958) S.C.R. 828 : A.I.R. 1958 S.C. 36.

2. (1954) 1 M.L.J. 730 : (1954) S.C.J. 493 : (1955) 1 S.C.R. 26 : A.I.R. 1954 S.C. 369.

3. (1958) S.C.J. 161 : (1958) S.C.R. 571 : A.I.R. 1957 S.C. 892.

4. (1958) 1 M.L.J. (S.C.) 162 : (1958) 1 An. W.R. (S.C.) 162 : (1958) S.C.J. 451 : (1958) S.C.R. 1052 : A.I.R. 1958 S.C. 232.

5. (1961) 2 S.C.J. 58 : (1961) 1 S.C.R. 88 : A.I.R. 1960 S.C. 1305.

6. A.I.R. 1965 All. 142 (F.B.).

We may say that the question whether Article 465-A, Note (1), violates Article 311 of the Constitution was not argued before us and we say nothing about it.

In the result the appeal fails and is dismissed with costs.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—A. K. SARKAR, *Chief Justice*, J. R. MUDHOLKAR AND R. S. BACHAWAT, JJ.

Sita Ram

.. *Appellant**

v.

The State of Uttar Pradesh

.. *Respondent.*

Evidence Act (I of 1872), section 25—Confession in a letter addressed to Sub-Inspector—If made to a Police Officer—Admissibility.

Penal Code (XLV of 1860), section 302—Offence of murder—Circumstantial evidence—Conviction based on. Practice—Appeal to Supreme Court by Special Leave—Concurrent findings of fact—If can be questioned.

The finding of each of the Courts below that the relations between the appellant and his wife were very much strained, for the reasons stated by them, being one of fact cannot be lightly permitted to be questioned in an appeal by Special Leave ; no ground has been made out to justify the Court looking into the evidence for itself.

From the facts on record and the circumstantial evidence, the Courts below were justified in coming to the conclusion that the appellant had an opportunity to commit the murder of his wife.

The appellant's defence of his absence in Punjab has not been accepted by the Courts below.

There are adequate materials to justify the conviction for murder.

On the question of admissibility of the confession in view of the ban under section 25 of the Evidence Act,

Held : By majority (Sarkar, G.J. and Mudholkar, J.): The letter cannot become a confession made to a Police Officer merely because the word 'Sub-Inspector' was there. It is not a confession made to a Police Officer for the simple reason that it was not so made from every point of view.

Per Bachawat, J.—A confession can be made to a Police Officer by a written message communicated to him through post, messenger, or otherwise ; the presence or the absence of the Police Officer near the accused is not decisive on the question. The phrase "confession made to a Police Officer" includes a confession made to a Police Officer in a letter written to him and subsequently received by him. The wholesome provisions of section 25 should not be cut down.

Appeal from the Judgment and Order dated the 2nd March, 1964, of the Allahabad High Court in Criminal Appeal No. 2531 of 1963 Referred No. 160 of 1963.

K. L. Sharma and Harbans Singh, Advocates, for Appellant.

O. P. Rana, Advocate, for Respondent.

The Court delivered the following Judgments.

Mudholkar, J. (for Sarkar, C.J. and himself)—The Additional Sessions Judge, Kumaon, after convicting the appellant Sita Ram of an offence under section 302, Indian Penal Code, for the murder of his wife Sindura Rani, has sentenced him to death. The High Court of Allahabad affirmed his conviction but reduced the sentence to one of imprisonment for life.

The fact that Sindura Rani met with a homicidal death is not in dispute. What is, however, contended on behalf of the appellant is that there is no evidence on the basis of which his conviction could be based. Admittedly there are no eye-witnesses to the occurrence. The prosecution case against him rests on the following material: (1) motive, (2) opportunity, (3) subsequent conduct, (4) false explanation and (5) confessional statements.

There is ample evidence on record to show that the relations between the appellant and his wife were very much strained, that the two were living apart and that this was because the appellant suspected that his wife was a woman of loose character. This evidence consists of the testimony of some near relatives and also of several letters written by the appellant to his wife Sindura Rani, to his mother-in-law Inder Kaur (P.W. 2) and to his brother-in-law Tilak Raj (P.W.1). The appellant had denied that the letters were in his hand writing but it has been found by both the Courts below that they were in fact written by him. The finding of each of the two Courts below that the relations between the appellant and his wife were strained because the appellant not merely suspected the fidelity of his wife but also charged her with unchastity being one of fact cannot be lightly permitted to be questioned in an appeal by Special Leave. No ground has been made out by learned Counsel which would justify our looking into the evidence for ourselves.

Similarly, on the question of opportunity, Sindura Rani who had gone to stay with her people had been asked by the appellant to return home on the pretext that one of their children was ill and accordingly she arrived at Kashipur where the appellant lived only 5 or 6 days prior to the incident. Since her return she and the appellant were the only two adult persons living in the house of the appellant. The only other person living with them was their daughter about two years old.

When the Sub-Inspector of Police arrived on the morning of 15th September, 1962, after receiving a report that the appellant's house was locked from outside and the cry of a child from inside could be heard, found the outer door of the house locked. After breaking it open he found a lantern burning by the side of the dead body of Sindura Rani. From these facts the Courts below were justified in coming to the conclusion that the appellant had an opportunity to commit the murder of his wife Sindura Rani. The appellant's defence that he had gone to Punjab along with one Pritam Singh on 13th September, 1962, and could return from there on 19th September, has not been accepted by the two Courts below in the absence of any material to substantiate it.

In addition to these there is the fact that the appellant could not be found till 19th September, on which date he surrendered himself before the Court. It would be reasonable to infer from this that he was absconding till this date. The explanation which the appellant gave concerning his absence has been rightly rejected as false. In the circumstances there was adequate material before the Courts below upon which his conviction could be based.

In addition to this circumstantial evidence the prosecution placed reliance upon Exhibit Ka. 9. This is a letter dated 14th September, 1962, addressed to the 'Sub-Inspector' and bears the signature of the appellant in Urdu. It reads thus:

"I have myself committed the murder of my wife Smt. Sindura Rani. Nobody else perpetrated this crime. I would appear myself after 20 or 25 days and then will state everything. One day the law will extend its hands and will get me arrested. I would surrender myself.

(S/d. in Urdu) Sita Ram Narola,
14th September, 1962."

On the back of this letter is written the following:

"It is the first and the last offence of my life. I have not done any illegal act nor I had the courage to do that, but this woman compelled me to do so and I had to break the law."

This letter was found on a table near the dead body of Sindura Rani. It was noticed by the Sub-Inspector Jagbir Singh, P.W. 16 and seized in the presence of three persons who attested the seizure memo. and were later examined as witnesses in the case. The prosecution has established satisfactorily that the letter is in the handwriting of the appellant and that the signature it bears is also that of the appellant. Learned Counsel for the appellant has challenged the admissibility of this letter on the ground that it amounts to a confession to a Police Officer and that, therefore, section 25 of the Evidence Act renders it inadmissible in evidence. We do not think that the objection is well-founded. No doubt, the letter contains a confession and is also addressed to a Police Officer. That cannot make it a confession made to a Police Officer which is within the bar created by section 25 of the Evidence Act.

The Police Officer was not nearby when the letter was written or knew that it was being written. In such circumstances quite obviously the letter would not have been a confession to the Police Officer if the words "Sub-Inspector" had not been written. Nor do we think it can become one in similar circumstances only because the words "Sub-Inspector" had been written there. It would still have not been a confession made to a Police Officer for the simple reason that it was not so made from any point of view.

We agree with the High Court, therefore, that the confession contained in Exhibit *Ka-9* is admissible and that it is an additional circumstance which can be pressed in aid in support of the charge against the appellant. However, as already stated, even without this confessional statement there was sufficient material before the Courts below on the basis of which the appellant's conviction could be sustained.

The appeal is without any merit and is accordingly dismissed.

Bachawat, J.—Section 25 of the Indian Evidence Act reads:

"No confession made to a Police Officer shall be proved as against a person accused of any offence."

In my opinion, the letter, Exhibit *Ka-9*, is a confession made to a Police Officer, and is not admissible in evidence against the appellant. The letter contained a confession, and was addressed to the Sub-Inspector. The appellant wrote the letter with the intention that it should be received by the Sub-Inspector, kept it on a table near the dead body of his wife and left the house after locking it. The lock was broken open and the letter was recovered by the Sub-Inspector, Kashipur, to whom the letter was written. The Sub-Inspector received the letter as effectively as if it was sent to him by post or by a peon.

It is said that the appellant made no confession to the Sub-Inspector, inasmuch as the officer was not present near the appellant when he wrote the letter. I do not see why a confession cannot be made to a Police Officer unless he is present in the immediate vicinity of the accused. A confession can be made to a Police Officer by an oral message to him over the telephone or the radio as also by a written message communicated to him through post, messenger or otherwise. The presence or absence of the Police Officer near the accused is not decisive on the question whether the confession is hit by section 25. A confession to a stranger though made in the presence of a Police Officer is not hit by section 25. On the other hand, a confession to a Police Officer is within the ban of section 25, though it was not made in his presence. A confessional letter written to a Police Officer and sent to him by post, messenger or otherwise is not outside the ban of section 25 because the Police Officer was ignorant of the letter at the moment when it was being written.

In *Queen v. Huribole*¹, Garth, C.J., said that section 25 is an enactment to which the Court should give the fullest effect. He added:

"I think it better in construing a section such as the 25th, which was intended as a wholesome protection to the accused, to construe it in its widest and most popular signification."

In its widest and most popular signification, the phrase, "confession made to a Police Officer" includes a confession made to a Police Officer in a letter written to him and subsequently received by him. We should not cut down the wholesome protection of section 25 by refined arguments.

I am, therefore, of the opinion that the Courts below were in error in admitting Exhibit *Ka-9* against the appellant.

I, however, agree that, apart from Exhibit *Ka-9*, there are sufficient materials on the record establishing the guilt of the appellant. The appeal must, therefore, fail.

The appeal is dismissed.

K.G.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH, V. RAMASWAMI AND V. BHARGAVA, JJ.

The State of Mysore (In all Appeals)

.. Appellant*

v.

M/s. Guduthur Thimmappa & Son and another

.. Respondents.

*Central Sales Tax Act (LXXIV of 1956), section 3—Sales in the course of inter-State trade—Tests.**Madras General Sales Tax (Turnover and Assessment) Rules (1939), Rule 4-A (iv) (b)—Scope—Tax under, when attracted.**Constitution of India (1950), Article 136—New plea—Cannot be raised for first time before Supreme Court.*

The nature of transactions found by the Tribunal (in the instant case) shows that property in the cotton bales sold by the respondents did not pass during the movement of goods from one State to another by transfer of documents of title, and further, that the movement of goods from the Madras area to places outside the State was not the result of any covenant or incident of the contract of sale. The contract of sale was completely carried through within the Madras area itself, in which area the price was received by the respondents and the cotton bales were delivered to the buyers. The movement of the cotton bales outside the State was by the buyers themselves after property in them had passed to them, so that these sales were not sales in the course of inter-State trade.

The language of rule 4-A (iv) (b) of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939, is clear that the tax is to be levied from the dealer who buys it in the State and is the last dealer not exempt from taxation. The test laid down thus is as to who buys it in the State and not who is in the State for purposes of buying the cotton. It is to be noticed that in the rule the expression used is "the dealer who buys it in the State and is the last dealer not exempt from taxation". If the intention had been that the location of the buyer himself should be the criterion for imposing tax on him, the language used in the rule would have been quite different. It could easily have been laid down that the tax will be levied from the dealer in the State who buys it as the last dealer not exempt from taxation. The expression as used in the rule makes it perfectly clear that the location of the dealer himself is immaterial. The liability to be taxed attaches if the purchase itself by the dealer is within the State.

When non-resident buyers purchase within the State, cotton for use in the manufacturing process of their mills situated outside the State, such purchase by them would amount to the business of purchase by dealers as to attract tax under rule 4-A (iv) (b) of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939. (*The State of Andhra Pradesh v. M/s. Abdul Bakhi and Brothers*, (1965) 1 S.C.J. 297.

A contention not raised at any earlier stage cannot be urged for the first time before the Supreme Court in an appeal by Special Leave.

Appeals by Special Leave from the Judgment and Order dated the 29th January, 1962, of the Mysore High Court in Civil Revision Petitions Nos. 1169 to 1176 of 1958, and 841, 842 and 865 of 1959 respectively.

R. Ganapathy Iyer and R. N. Sachthey, Advocates, for Appellant (In all Appeals).

R. Gopalakrishnan, Advocate, for Respondents (In all Appeals).

The Judgment of the Court was delivered by

Bhargava, J.—These appeals arise out of proceedings for assessment of sales tax under the Madras General Sales Tax Act (IX of 1939) (hereinafter referred to as "the Act") in respect of certain sales of cotton. The respondents were registered dealers in cotton, including kappas, groundnuts and cotton seeds with their Head Office at Bellary and Branch Offices at a number of places. They were also licensees under section 8 of the Act in respect of cotton. They made various purchases of cotton at their places of business and subsequently sold them to different

parties. Amongst these were a number of persons who were not resident within the area to which the Act applied. The question arose as to who was liable to pay the sales tax in respect of those transactions of sale of cotton in which the cotton had been sold by the respondents to non-residents. When the case came up before the Mysore Sales Tax Appellate Tribunal, the Tribunal determined the course of transactions and held as follows :—

“ The examination of the contracts, the invoices, the railway receipts, insurance policies and other documents relating to the disputed turnovers shows that the non-resident foreigners place orders for the required number of bales of cotton specifying the quality and the rate sometimes on phone which would be confirmed subsequently by telegrams or letters and finally by written agreements. Thereupon, the appellants consign the cotton bales in their own name, the consignee being the non-resident foreign buyers (except in respect of a total turnover of Rs. 2,93,567-2-0 which would cover the items 1, 3, 5, 7, 31, 32, 33 and 44 of the typed statement of the account for the year 1954-55 and a total turnover of Rs. 3,71,880-13-0 which would cover the items 6, 10, 11, 12, 13, 14, 15, 16, 24, 25, 26, 29, 30, 31, 35, 36 and 37 of the typed statement of account for the year 1955-56) and send the railway receipts to their bankers at the other end for the collection of the amount. It is seen that notwithstanding the fact that there are specific provisions in the contract that 90 per cent. of the invoice amounts should be paid to the bankers when the railway receipts would be delivered to the purchasers, surprisingly the said provision is rendered nugatory by reason of the fact that the appellants despatch the cotton in such a way that the consignee could get cotton bales at the other end even though without any payment to the banker. The moment the appellants consigned the goods, they will have lost complete control and dominion over the cotton thus despatched. Further, non-resident foreign buyers who obtained the necessary transport permit under the Cotton Control Order, 1950, actually insure the cotton bales as the owners thereof and transmit the same from Bellary to the destination. This is so even in cases where the appellants themselves have consigned the goods in their own name, the consignees being themselves. All these facts clearly go to show that the sales are completed at Bellary and the non-resident foreign buyers in whose favour the property in the goods had been transferred actually transported the cotton thus purchased. The State Representative does not seriously dispute about the correctness of the *modus operandi* of the appellants in their dealings with their purchasers during five years of assessments. Bearing these facts in mind, we shall now proceed to examine each of the contentions raised by the learned Counsel.”

On these facts, the question that fell for determination was whether for purposes of section 5 (2) of the Act read with rule 4 (iv) (b) of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939 (hereinafter referred to as “the Rules”), the respondents were the dealers who bought the cotton in the State and were the last dealers not exempt from taxation under section 3 (3) of the Act on the amount for which the cotton was bought by them. The contention on behalf of the respondents was that the cotton was sold by them within the State of Madras to parties, who were residing outside the State of Madras; but the sales having been made by them within the State of Madras, they could not be held to be dealers who bought the cotton in the State and were the last dealers for that purpose not exempt from taxation. According to their contention, the parties to whom they sold the cotton within the State were the persons liable to be taxed in accordance with section 5 (2) of the Act and rule 4-A (iv) (b) of the Rules. The Tribunal accepted this plea of the respondents, allowed the appeals, and set aside the orders of the subordinate authorities directing payment of sales tax by the respondents. That order was upheld by the High Court of Mysore when the revisions against the orders of the Tribunal came up for decision before it. These appeals before us coming up by Special Leave are directed against the above order of the High Court. We may mention that the revisions came up before the High Court of Mysore, because the area, in respect of which the dispute arose, was originally within the State of Madras, but, on Reorganisation of States, came within the State of Mysore. The law applicable to sales in the year in question, however, continued to be the Madras Sales Tax Act IX of 1939; and that area came to be designated as Madras Area of the State of Mysore.

In these appeals, two points were canvassed before us by learned Counsel for the State of Mysore. At the initial stage, learned Counsel for the State indicated that he did not intend to challenge the finding that the situs of the sales in question were all within the Madras area; but at a later stage, he challenged this finding as the second alternative point in support of these appeals. We may deal with this point first.

The course of transactions found by the Tribunal, reproduced above, led the Tribunal and the High Court to the finding that the situs of the sales by the respondents to the non-resident parties was in Bellary where the sales were completed and delivery also took place. The submission by learned Counsel for the appellant was that none of those parties themselves came within the State to Bellary either for the purpose of entering into contracts for sale, or for purposes of taking delivery. Delivery was given to common carrier, and consequently, it should be held that the sales were completed not within the State, but outside at the places to which the goods were consigned for delivery to the various parties. We are unable to accept this submission. It has been rightly held by the High Court that the common carrier took delivery as agent of the buyer and that delivery was within the State. There is the further circumstance that, during transit, the goods were insured by the buyers at their own cost, and not by the respondents. The buyers thus recognised that they were already the owners of the cotton bales as soon as they were given for transmission to the common carrier.

In this connection, a question also arose whether the sales by the respondents to those non-resident parties were sales in the course of inter-State trade. What are the sales in the course of inter-State trade was explained by this Court in *Tata Iron and Steel Co., Limited, Bombay v. S. R. Sarkar and others*¹, where clauses (a) and (b) of section 3 of the Central Sales Tax Act, 1956 were interpreted as follows :

"In our view, therefore, within clause (b) of section 3 are included sales in which property in the goods passes during the movement of the goods from one State to another by transfer of documents of title thereto : clause (a) of section 3 covers sales, other than those included in clause (b), in which the movement of goods from one State to another is the result of a covenant or incident of the contract of sale, and property in the goods passes in either State."

The nature of transactions found by the Tribunal in the cases before us shows that property in the cotton bales sold by the respondents did not pass during the movement of goods from one State to another by transfer of documents of title, and, further, that the movement of goods from the Madras area to places outside the State was not the result of any covenant or incident of the contract of sale. The contract of sale was completely carried through within the Madras area itself in which area the price was received by the respondents and the cotton bales were delivered to the buyers. The movement of the cotton bales outside the State was by the buyers themselves after property in them had passed to them; so that these sales were not sales in the course of inter-State trade.

We now come to the second and the main point which was urged before us by learned Counsel for the appellant. The submission of learned Counsel was that a buyer, who was not resident within the area to which the Act applied, could not be held to be the last dealer for purposes of rule 4-A (iv) (b) of the Rules. According to him, it is the situs of the seller and the buyer which determines the applicability of this rule, and not the situs of the sale of cotton itself. We are unable to accept this submission. The language of the rule is clear that the tax is to be levied from the dealer who buys it in the State and is the last dealer not exempt from taxation. The test laid down thus is as to who buys it in the State and not who is in the State for purposes of buying the cotton. The Mills outside the State were no doubt carrying on their main business of manufacture of yarn or cloth outside the State; but so far as the act of purchase of these cotton bales was concerned, it was carried out by them within the State. It is to be noticed that in the rule the expression used is "the dealer who buys it in the State and is the last dealer not exempt from taxation". If the intention had been that the location of the buyer himself should be the criterion for imposing tax on him, the language used in the rule would have been quite different. It could easily have been laid down that the tax will be levied from the dealer in the State who buys it as the last dealer not exempt from taxation. The expression as used in the rule makes it perfectly clear that the location of the dealer himself is immaterial. The

liability to be taxed attaches if the purchase itself by the dealer is within the State. In the case of the sales in question, therefore, the buyers who purchased the cotton bales from the respondents were the last dealers who bought those cotton bales in the State and the single point tax under section 5 (2) of the Act had to be levied from them and not from the respondents.

In this connection, an alternative argument was also raised for the first time by learned Counsel for the appellant that those outside buyers could not be held to be dealers carrying on the business of purchase in the State, and if they were not dealers, the purchases by them had to be ignored, so that the last buyers in the State would be the respondents, because their purchases would be the last purchases by dealers made when they acquired these cotton bales subsequently sold by them. This contention was not raised at any earlier stage before the Tribunal or the High Court, and it is, therefore, not open to the appellant to urge it before this Court for the first time. In any case, it is clear that the outside buyers were all mills which were purchasing cotton bales for use in their manufacturing process and such purchases by them would amount to purchases of raw materials for their business. Purchases of this nature have already been held by this Court to constitute the business of purchase by the buyers in *The State of Andhra Pradesh v. M/s. H. Abdul Bakhi & Bros.*¹. Consequently, this ground raised has also no force. The appeals fail and are dismissed with costs. One hearing fee only.

V. K.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, *Chief Justice* AND S. M. SIKRI, J.

The State of Madhya Pradesh

.. *Appellant**

v.

M/s. Azad Bharat Finance Co., and another

.. *Respondents.*

Opium Act (I of 1878), as amended by Opium (Madhya Bharat Amendment) Act (XV of 1955), section 11
—Provisions if mandatory.

Interpretation of Statutes—'Shall' meaning of.

Contraband opium was transported in a motor truck driven by a hire-purchaser from the respondent and though the hirer was acquitted, the truck was ordered to be confiscated by the Magistrate but on revision the High Court of Madhya Pradesh construed that the use of 'shall' in section 11 of the Madhya Bharat Act, 1955 does not make it obligatory and it means only 'may'. Hence the appeal by Special Leave to the Supreme Court.

Held : It is well settled that the use of the word 'shall' does not always mean that the enactment is obligatory or mandatory ; it depends on the context in which the word is used and the other circumstances.

If it is a penal statute it should, if possible be construed in such a way that a person who has not committed or abetted any offence should not be visited with penalty.

If 'shall' be construed as if it were a mandatory provision then the Madhya Bharat Act itself may have to be struck down, as imposing unreasonable restrictions, under Article 19 of the Constitution.

On the aforesaid considerations, section 11 of the Act was rightly construed by the High Court not to be obligatory but that it only vests a discretion in Courts to be exercised in the circumstances of the case—whether the owner, in the instant case, who did not authorise the transport of contraband opium and who had no knowledge it would be so used in such transport, should be penalised by confiscation of the truck.

1. (1965) 1 S.C.J. 297 : (1965) 1 M.L.J. (S.C.) S.C. 531.
29 : (1965) 1 An.W.R. (S.C.) 29 : A.I.R. 1965

* Cr.L.A. No. 97 of 1964.

Held further the High Court could interfere in revision as the Magistrate did not exercise his discretion in the case, but felt bound to order confiscation by the use of the word 'shall' in the section.

Appeal by Special Leave from the Judgment and Order dated the 29th January, 1964, of the Madhya Pradesh High Court (Gwalior Bench) in Criminal Revision No. 5 of 1963.

I. N. Shroff, Advocate, for Appellant.

R. L. Anand, Senior Advocate (*S. N. Anand*, Advocate, with him), for Respondents.

The Judgment of the Court was delivered by

Sikri, J.—This appeal by Special Leave is directed against the judgment of the Madhya Pradesh High Court (Gwalior Bench) in a Criminal Revision filed by M/s. Azad Bharat Finance Company, one of the respondents in this appeal. The revision arose out of the following facts. On 3rd May, 1961, truck No. M.P.E. 1548, while it was parked at the bus station, Guna, was searched by the Excise Sub-Inspector and he found contraband opium weighing about three seers in it. Five persons were challanged for the alleged illegal possession of contraband opium and for its transport, under sections 9-A and 9-B of the Opium Act (I of 1878) as modified by the Opium (Madhya Bharat Amendment) Act, 1955, hereinafter referred to as the Madhya Bharat Act. Harbhajan Singh, one of the accused, is alleged to have absconded, and, therefore, he was tried separately later on. The Additional District Magistrate, Guna, convicted three persons and acquitted one person. Regarding the truck, he ordered that the final orders regarding the disposal of the truck would be passed later, on the conclusion of the trial of Harbhajan Singh. It may be mentioned that Harbhajan Singh had taken this truck under a hire-purchase agreement from M/s. Azad Bharat Finance Co., and he was not present in or near the truck when the contraband opium was taken possession of by the Excise Officer.

On 28th May, 1962, M/s. Azad Bharat Finance Co. applied in the Court of Shri M. C. Bohre, in which the trial of Harbhajan Singh was going on, for the release of the truck. On 7th September, 1962, Harbhajan Singh was acquitted by the Magistrate but he ordered that the truck be confiscated to the State. The Magistrate was of the opinion that section 11 of the Madhya Bharat Act showed clearly that the truck in which the opium was carried had to be forfeited in all circumstances. He observed:

"By the use of the word 'shall' this Court was compelled that the truck be seized, may be there was the hand of the owner in it or not and neither there is any provision that the truck owner had the knowledge or not of the opium being carried."

Both Harbhajan Singh and M/s. Azad Bharat Finance Co. filed revisions in the Court of the Sessions Judge. The Sessions Judge also held that the word "shall" in section 11 (d) was mandatory and not directory. He observed:

"Though it is correct that the truck was not used for carrying opium with the knowledge or connivance of the owner but section 11 (d) as applicable in this State does not give discretion to the Court in not ordering the confiscation of the conveyance used for carrying contraband opium."

M/s. Azad Bharat Finance Co. filed a revision in the High Court. The High Court held as follows:—

"The word 'shall' occurring in section 11 of the M.P. Opium Act means 'may' and that it confers discretion on the Court to confiscate the conveyance provided it belongs to the offender. But where it is not, so, and, the owner of the truck has neither authorised the offender to transport opium, nor is there any reason to believe that the owner knew that his vehicle was likely to be used for transporting contraband opium, the conveyance should not be confiscated because confiscation in such circumstances would be tantamount to punishing one, who has not committed any offence under the Opium Act."

The learned Counsel for the appellant, Mr. Shroff, contends that the Opium (Madhya Bharat Amendment) Act, 1955 (XV of 1955) which amended the Opium

Act, 1878, deliberately employed a different phraseology with the intention of making it obligatory on a Court to confiscate a vehicle in which contraband opium had been transported. He points out that in the Opium Act, 1878, in section 11 the relevant words are as follows :—

“Section 11.—*Confiscation of opium.*—In any case in which an offence under section 9 has been committed,—

The vessels, packages and coverings in which any opium liable to confiscation under this section is found, and the other contents (if any) of the vessel or package in which such opium may be concealed, and the animals and conveyances used in carrying it, shall likewise be liable to confiscation.”

He stresses the words “liable to confiscation” which according to him and certain authorities clearly give a discretion to the Court whether to confiscate the vehicle or not. In the Madhya Bharat Amendment Act the section providing for confiscation is as follows :—

“Section 11.—In any case in which an offence under sections 9, 9-A, 9-B, 9-C, 9-D, 9-E, 9-F and 9-G has been committed, the property detailed herein below shall be confiscated :—

(d) the receptacles, packages and coverings, in which any opium liable to confiscation under this section is found, and the other contents (if any) of the receptacle or package in which such opium may be concealed, and the animals, carts, vessels, rafts and conveyances used in carrying it.”

In our opinion, the High Court was correct in reading section 11 of the Madhya Bharat Act as permissive and not obligatory. It is well-settled that the use of the word “shall” does not always mean that the enactment is obligatory or mandatory; it depends upon the context in which the word “shall” occurs and the other circumstances. Three considerations are relevant in construing section 11. First, it is not denied by Mr. Shroff that it would be unjust to confiscate the truck of a person if he has no knowledge whatsoever that the truck was being used for transporting opium. Suppose a person steals a truck and then uses it for transporting contraband opium. According to Mr. Shroff, the truck would have to be confiscated. It is well recognised that if a statute leads to absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence (*vide Tirath Singh v. Bachittar Singh*¹).

Secondly, it is a penal statute and it should, if possible, be construed in such a way that a person who has not committed or abetted any offence should not be visited with a penalty.

Thirdly, if the meaning suggested by Mr. Shroff is given, section 11 (d) of the Madhya Bharat Act, may have to be struck down as imposing unreasonable restrictions under Article 19 of the Constitution. Bearing all these considerations in mind, we consider that section 11 of the Madhya Bharat Act is not obligatory and it is for the Court to consider in each case whether the vehicle in which the contraband opium is found or is being transported should be confiscated or not, having regard to all the circumstances of the case.

Mr. Shroff then contends that if the matter is discretionary, the High Court should not have interfered in the discretion exercised by the learned Sessions Judge. But apart from the question that this point was not raised before the High Court, both the Magistrate and the Sessions Judge ordered confiscation of the truck on the ground that they had no option in the matter.

Mr. Shroff then raises the point that M/s. Azad Bharat Finance Co. was a third party in the case and was not entitled to apply for setting aside the order of confiscation or request for the return of the truck. This point was not raised before the High Court and, therefore, cannot be allowed to be raised at this stage.

In the result the appeal fails and is dismissed.

K.G.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—A. K. SARKAR, *Chief Justice*, J. R. MUDHOLKAR, R. S. BACHAWAT, J. M. SHELAT AND RAGHUBAR DAYAL, JJ.

Gopi Ram

.. Petitioner*

v.

The State of Rajasthan and others

.. Respondents.

Defence of India Rules (1962), rules 30 (1) (b) and 30-A (7)—Order of detention served on detenu while in jail custody—Validity of—Order of Governor that detention be continued—No recital of review by the reviewing authority under rule 30-A (7)—Affidavit proving such review—Detention valid.

The facts leading to the petition for issue of a writ of *habeas corpus* by the petitioner are stated in the judgment. The two grounds of challenge are: (1) the petitioner was already in jail custody when the order of detention was served on him; (2) the reviewing authority under rule 30-A (7) of Defence of India Rules (1962) did not review the order of detention and therefore the order made by the Governor directing the petitioner's detention be continued is vitiated.

Held : It is clear from the facts of the case that the satisfaction of the District Magistrate was arrived at as long ago as 5th April, 1963, when the petitioner was not in custody and it was cancelled on 18th January, 1965, for some formal defects therein and was followed up by another order of 19th January by the Magistrate. This later order cannot but be regarded as passed upon the satisfaction of the District Magistrate regarding his detention under rule 30 (1) (b) before he was arrested for an offence under Penal Code on 21st January, 1965, and was detained in jail as an under-trial prisoner.

The fact that the order of detention was served on him in jail on 23rd January, 1965, does not make that order bad in law.

The validity of an order of detention does not necessarily depend upon whether the order was served on the petitioner when he was or was not in jail custody. All the surrounding circumstances have got to be borne in mind for deciding the validity of the order.

The Legislature has left it to the detaining authority to be satisfied about the necessity of detention; in the absence of *malafides* on the part of that authority the Court cannot go into the question of propriety of the subjective satisfaction of the detaining authority. When the initial order of detention is not challenged on the ground of *malafides* its supersession by another order on the same ground as the earlier one cannot be challenged as *malafide* merely because when it was made the petitioner was already in jail custody.

The second ground is misconceived. The affidavit of the District Magistrate on personal knowledge proves that the order was reviewed by the reviewing authority. In view of this categorical statement in the affidavit the contention that from the wording of the order of the Governor it is to be inferred that it was reviewed by the Governor himself contrary to the provisions of the Rules cannot be accepted.

Petition under Article 32 of the Constitution of India for a writ in the nature of *habeas corpus*.

S. C. Agarwala, Advocate (*amicus curiae*), for Petitioner.

M. M. Tiwari, Senior Advocate (R. N. Sachthy, Advocate, with him), for Respondents.

The Judgment of the Court was delivered by

Mudholkar, J.—The petitioner who has been detained in the Central Jail, Jaipur under an order dated 19th January, 1965, made by the District Magistrate, Ganganagar under clause (b) of sub-rule (1) of rule 30 of the Defence of India Rules, 1962 has moved this Court under Article 32 of the Constitution for the grant of a writ in the nature of *habeas corpus*.

An order of detention of the petitioner under the aforesaid provision was first made on 5th April, 1963. It could not be served on the petitioner for a long time because it is said that he was absconding. On 1st November, 1964, he was arrested

in connection with an offence, under section 307/395, Indian Penal Code, but was released on bail. On 4th November, 1964 the order of detention was served on him and he was sent to the Central Jail, Jaipur for being detained. On 18th January, 1965, the original order of detention was cancelled by the Government because, we are informed, of some defect therein. The order of cancellation was served on him on 21st January, 1965, and he was released in pursuance thereto. Immediately thereafter, however, he was re-arrested under a warrant issued by the Sub-Divisional Magistrate, Karampur in respect of the offence under section 307/395, Indian Penal Code. Prior to this, that is, on 19th January, 1965, the District Magistrate, Ganganagar made an order of detention of the petitioner. This order was served on him in jail on 23rd January, 1965. Since that date he is in detention. By his order dated 7th July, 1965, the Governor of Rajasthan, in exercise of the powers conferred by sub-rule (7) of rule 30-A directed that the petitioner's detention be continued.

Mr. S. C. Agarwala appearing for the petitioner has challenged the detention of the petitioner on two grounds: (1) that as the petitioner was already in jail when the order dated 19th January, 1965, was served on him, his detention is illegal; (2) that the reviewing authority contemplated by sub-rule (7) of rule 30-A did not review, the order of detention and, therefore, the order made by the Governor on 7th July, 1965, is vitiated.

In support of the first contention reliance is placed by learned Counsel on the decision of this Court in *Rameshwar Shaw v. District Magistrate, Burdwan*¹. In that case an order of detention was made against a person under section 3 (1) of the Preventive Detention Act, 1950 at a point of time when that person was an under-trial prisoner in jail and served on him in jail. It was contended before this Court that it would not be possible for the detaining authority to come to the conclusion that a person who is in jail custody may act in a prejudicial manner unless he is detained. While dealing with this contention this Court observed that it is necessary to bear in mind the past conduct or antecedent history of the person on which the detaining authority purports to act, that the activities of the person must be proximate in point of time to the making of the order of detention and also that these should have a rational connection with the conclusion that the detention of the person is necessary. It is true that upon the facts of that case this Court quashed the order of detention but it also observed thus :

"As abstract proposition of law, there may not be any doubt that section 3 (1) (a) does not preclude the authority from passing an order of detention against a person whilst he is in detention or in jail ; but the relevant facts in connection with the making of the order may differ and that may make a difference in the application of the principle that a detention order can be passed against a person in jail."

This decision was referred to in *Makhan Singh Tarsikka v. State of Punjab*², and it was held there that the principles laid down therein would also apply to the case of a person against whom an order of detention is made under rule 30 of the Defence of India Rules. Mr. Agarwala relies upon the observations of this Court in the aforesaid decision to the effect that the service of a detention order on a person who is already in jail custody virtually seeks to effectuate what may be called a "double detention" and such double detention is not intended either by section 3 (1) (a) of the Preventive Detention Act or rule 30 (1) (b) of the Defence of India Rules. We may, however, mention that the abstract proposition of law stated in *Rameshwar Shaw's case*¹ has been reiterated in this case also. After reiterating it this Court has observed :

"Besides, when a person is in jail custody and criminal proceedings are pending against him, the appropriate authority may, in a given case take the view that the criminal proceedings may end very soon and may terminate in his acquittal. In such a case, it would be open to the appropriate authority to make an order of detention, if the requisite conditions of the rule or the section are satisfied, and serve it on the person concerned if and after he is acquitted in the said criminal proceedings (p. 1126)."

Both these decisions were relied upon on behalf of the petitioners in *Godavari Shamrao Parulekar v. State of Maharashtra*³. These decisions were distinguished on

1. A.I.R. 1964 S.C. 334.

2. A.I.R. 1964 S.C. 1120.

3. (1965) 2 S.C.J. 523 : (1965) M.L.J. (Cri.) 765 : A.I.R. 1964 S.C. 1128.

the ground that the principle laid down in them may apply to a case where the person against whom an order of detention was made is either an under-trial prisoner or is a convicted person the period of whose sentence has to run for some length of time, this Court also observed :

"The principle of those two cases cannot, in our opinion, be applied to a case where a fresh order of detention was passed after the cancellation or revocation of an earlier order of detention."

From the facts which we have set out it is clear that the satisfaction of the District Magistrate as to the existence of circumstances which necessitated the detention of the petitioner was not arrived at at a point of time when the petitioner was already in jail custody. It was arrived at as long ago as on 5th April, 1963. The original order made by the District Magistrate was cancelled on 18th January, 1964, because of some defect therein and was followed up by another order of detention of 19th January, 1965. In the circumstances the order dated 19th January, 1965, cannot but be regarded as being based upon the satisfaction of the District Magistrate regarding the necessity of the detention of the petitioner arrived at before the petitioner was detained in jail as an under-trial prisoner.

Mr. Agarwala, however, contended that the material date is the date of service of the detention order which, in this case, was 23rd January, 1965, and that on that date the petitioner who had been released on 21st January, 1965, in view of the cancellation of the earlier order of detention had been arrested under a warrant of the Sub-Divisional Magistrate and remanded to jail custody. Since he was already in jail custody, the argument proceeds, how could the District Magistrate be reasonably satisfied that his detention in jail was necessary for preventing him from acting in a manner prejudicial to public safety, etc.? Reliance was strongly placed by learned Counsel on certain observations in *Makhan Singh's case*¹, in support of his contention that if a person is already in jail the service of an order of detention on him is bad. As we read that decision as well as the one in *Rameshwar Shaw's case*², the validity of an order of detention does not necessarily depend upon whether the order was served on him when he was or was not in jail custody. All the surrounding circumstances have got to be borne in mind for deciding whether or not the order is valid. The essential thing is that the Legislature has left it to the detaining authority to be satisfied about the necessity of detention and that in the absence of *mala fides* on the part of that authority the Court cannot go into the question of the propriety of the subjective satisfaction of the detaining authority. Where the initial order of detention is not challenged on the ground of *mala fides* its supersession by another order of detention passed on the same ground as the one earlier made cannot be said to be tainted by *mala fides* merely because when it was made the person was already in jail custody.

As regards the second contention it seems to be plainly misconceived. The petitioner alleged that the detention order was not reviewed by the reviewing authority contemplated by sub-rule (7) of rule 30-A. This fact is denied on behalf of the State in the affidavit filed by the District Magistrate, Ganganagar who has sworn to the fact on the basis of his personal knowledge. There is no reason to disbelieve the averment. It is no doubt true that the order made by the Governor on 7th July, 1965 does not in clear language say that the order of detention was reviewed by the reviewing authority but it does state the fact that it was in fact reviewed. Mr. Agarwala wants us to infer from the order that the review was made not by the reviewing authority but by the Governor and this was contrary to the provisions of the aforesaid sub-rule. We cannot accept this contention in view of the categorical statement contained in the affidavit of the District Magistrate.

There is thus no force in either of the two contentions raised on behalf of the petitioner. We, therefore, dismiss this petition.

K.G.S.

Petition dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—V. RAMASWAMI, V. BHARGAVA AND RAGHUBAR DAYAL, JJ.

The State of Gujarat

.. Appellant*

v.

Vinaya Chandra Chhota Lal Pathi

.. Respondent.

Evidence Act (I of 1872), section 45—Handwriting of a person—Proof—Examination of a handwriting expert if a sine qua non.

Criminal trial—Misappropriation charge—Entries made by accused in a slip of paper together with statement of complainant amounting to admission of guilt—Admissibility of the slip—Admissions made under section 342 of Criminal Procedure Code in another criminal case and application made by accused in another criminal case containing admissions—Admissibility.

A Court is competent to compare the disputed writing of a person with others which are admitted or proved to be his writings. It may not be safe for a Court to record a finding about a person's writing in a certain document merely on the basis of comparison, but a Court can itself compare the writings in order to appreciate properly the other evidence produced before it in that regard. The opinion of a handwriting expert is also relevant in view of section 45 of the Evidence Act, but that too is not conclusive. It has also been held that the sole evidence of a handwriting expert is not normally sufficient for recording a definite finding about the writing being of a certain person or not. It follows that it is not essential that the handwriting expert must be examined in a case to prove or disprove disputed writing.

Where a person is charged with misappropriation of certain cheques, a slip of paper in which according to the complainant the accused noted down the various amounts which he orally admitted had been misappropriated by him, would be admissible in evidence. The entries in the slip together with the statement of the complainant would make out a confession of the accused that he had withdrawn the amounts of the cheques mentioned in the list and that he misappropriated them. So also a document which is an admission of the circumstances which have a bearing on the accusation brought against the accused would be admissible in evidence.

Admissions made under section 342 of the Criminal Procedure Code in another criminal case and an application given by the accused in another criminal case containing admissions would also be admissible in evidence.

Appeal by Special Leave from the Judgment and Order dated the 18th July, 1963, of the Gujarat High Court in Criminal Appeal No. 527 of 1963.

A. S. R. Chari, Senior Advocate (*M. V. Goswami* and *B. R. G. K. Achar*, Advocates, with him), for Appellant.

V. S. Nayyar and H. M. Chenoy, Advocates, for Respondent.

The Judgment of the Court was delivered by

Raghubar Dayal, J.—This appeal, by Special Leave, is by the State of Gujarat against the order of the Gujarat High Court acquitting the respondent of the offence under section 408, Indian Penal Code.

The respondent was an employee of Nalinkant, P.W. 1, the sole proprietor of Arora Trading Company, in 1959. He was in service from 1954. It was his duty to withdraw moneys from the Union Bank of India Ltd., with which Nalinkant had an account. Nalinkant used to leave his cheque book with a few blank signed cheques with the respondent when he had to go out of Ahmedabad, the place of business. The prosecution case is that the respondent took advantage of such blank cheques, filled them up and cashed them from the Bank and misappropriated the amounts so received. He made no entries about such receipts in the petty cash book maintained by the firm.

Nalinkant was the only witness to prove that the relevant entries in the cheques and the signatures at the back of the cheques in token of having received the amount

issue in the present case. In this statement the respondent admits being entrusted from time to time with blank cheques bearing the complainant's signatures, his committing breach of trust by withdrawing big amounts from the bank by exchanging those cheques, especially during the ten months prior to 14th December, 1959 and his not crediting the amounts of those cheques, presumably, in the accounts. It further mentions that the respondent had passed the writing out of his own sweet will and not on account of any improper pressure brought upon him. He further states that he had given this writing willingly on his being suspected and on one or two such cheques having been found out. In our opinion, this document is clearly an admission of the circumstances which have a bearing on the accusation brought against the respondent and is thus admissible in evidence. In fact, the admission in the document together with the statement of the complainant can also be treated as a confession of the respondent's cashing the three cheques, the subject-matter of the charge in this case.

The learned Judge is not right in observing that it was not safe to base a conviction on an extra-judicial confession. The conviction in this case was not based merely on the extra-judicial confession. There was the evidence of the complainant against the respondent. The extra-judicial confession strongly corroborated that statement. This document too, therefore, was admissible in evidence and had been wrongly ignored by the learned Judge.

The other two documents were considered irrelevant and therefore inadmissible in evidence. One of them is the statement of the respondent made under section 342, Criminal Procedure Code, on 3rd September, 1960, in a criminal case against him. The statements about the respondent's being a clerk of the complainant and the admissions of the respondent in this statement about the complainant's giving him cheques signed by him so that he could, whenever necessary, draw the amounts and about his maintaining the petty cash book and the circumstances in which the defalcations were found out and about the respondent's giving the writing dated 14th December, 1959, admitting the defalcations, are admissions for the purposes of the present case and as such this document was admissible in evidence to prove the respondent's admissions with respect to these facts.

The fourth document was an application given by the respondent on 27th October, 1960, in another criminal case against him. The document, as a whole is not of much use to the prosecution, but at the same time it cannot be held to be inadmissible as it consists of certain statements which could be used as admissions in this case even though the respondent had given such explanations with respect to his admissions as might have reduced their evidentiary value.

We are of opinion that the documents handed over by the respondent to the complainant on 14th December, 1959, and the statement of the respondent dated 3rd September, 1960, provide strong corroboration to the statement of the complainant.

The result is that this appeal must succeed. We accordingly allow the appeal, set aside the order of the High Court and restore that of the trial Court:

V.K.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—V. RAMASWAMI, V. BHARGAVA AND RAGHUBAR DAYAL, JJ.

Shivanarayan Kabra

.. Appellant*

v.

The State of Madras

.. Respondent.

*Penal Code (XLV of 1860), section 420—Conviction under—False pretence in express words not necessary.**Forward Contracts (Regulation) Act (LXXIV of 1952), sections 2 (c) and 15—Scope—Speculative contracts—If falls within the purview of the Act.**Contract—Pucca adat system of the Bombay market—Incidents—Status of pucca adatia.**Criminal Procedure Code (V of 1898), sections 361 (1), 537 and 239—Contravention of section 361 (1)—But no prejudice caused—Trial not vitiated—Several items of cheating part and parcel of one transaction—Trial on a single charge—Validity.*

For a conviction under section 420 of the Penal Code it is not necessary that a false pretence should be made in express words. It may be inferred from all the circumstances including the conduct of the accused in obtaining the property.

The argument that to forward contracts which are not really meant for actual delivery of goods at a future date but which are only speculative in character the Forward Contracts (Regulation) Act does not apply, is untenable. If the expression "forward contract" in section 2 (c) of the Act is not construed so as to include speculative contracts which ostensibly are for delivery of goods, the provisions of the Act would be rendered nugatory. It is a sound rule of interpretation that a statute should be so construed as to prevent the mischief and to advance the remedy according to the true intention of the makers of the statute. In construing therefore section 2 (c) and in determining its true scope, it is permissible to have regard to all such factors as can legitimately be taken into account in ascertaining the intention of the Legislature, such as the history of the statute, the reason which led to its being passed, the mischief which it intended to suppress and the remedy provided.

The Forward Contracts (Regulation) Act, 1952, was passed in order to put a stop to undesirable forms of speculation in forward trading in the wide interests of the community and in particular, the interests of the consumers for whom adequate safeguards were essential. Speculative contracts are therefore included within the purview of the Act.

It is well-established that the *pucca adatia* has no authority to pledge the credit of the upcountry constituent to the local merchant and there is no privity of contract as between the upcountry constituent and the local merchant. The *pucca adatia* is entitled to substitute his own goods towards the contract made for the principal and buy the principal's goods on his personal account. In other words, the *pucca adatia* is not the agent of his constituent but he is acting as a principal as regards his constituent and not as a disinterested middleman to bring two principals together.

A breach of the requirement of section 361 (1) of the Criminal Procedure Code is a mere irregularity and would not vitiate the trial unless prejudice is caused to the accused thereby. When the irregularity has not resulted in any injustice the provisions of section 537 of the Criminal Procedure Code are applicable to cure the defect.

When several items of cheating were part and parcel of one transaction, a trial of the accused on a single charge would be permissible under section 239 of the Criminal Procedure Code.

Appeal by Special Leave from the Judgment and Order dated the 16th July, 1963 of the Madras High Court in Criminal Revision Case No. 1139 of 1961 (Criminal Revision Petition No. 1095 of 1961).

Naunit Lal, Advocate, for Appellant.

A. V. Rangam, Advocate, for Respondent.

The Judgment of the Court was delivered by

Ramaswami, J.—This appeal is brought, by Special Leave, from the judgment of the Madras High Court dated 16th July, 1963 in Criminal Revision Case No. 1139 of 1961.

The appellant was charged for having committed offences under section 420, Indian Penal Code and section 21 (d) and (e) of the Forward Contracts (Regulation) Act, 1952 (LXXIV of 1952), hereinafter called the "Act", with regard to certain transactions between the appellant and P.W. 2, Rajam. The appellant was convicted of all the charges and was sentenced to rigorous imprisonment for one year and a fine of Rs. 1,000 under section 420, Indian Penal Code and a fine of Rs. 100 under each of clauses (d) and (e) of section 21 of the Act by the District Magistrate, Kumbakonam. He further directed that a sum of Rs. 1,000 out of the said fine should be paid to P.W. 2. On appeal, the convictions and sentences were affirmed by the Sessions Judge, West Thanjavur. The appellant took the matter in revision to the Madras High Court but the revision application was dismissed.

The appellant was the proprietor of a firm in Bombay known as "Jawarmal Gulab Chand". He advertised that people could invest capital in cotton, oil seeds and other commodities and that J. G. Market Reports issued by him could help them in the matter. P.W. 2, a wholesale merchant dealing in cotton seed, groundnut cakes, etc., at Kumbakonam became a subscriber to the reports. P.W. 2 asked the appellant for his business terms. The appellant sent him Exhibit P-30 wherein he stated that he undertook export, import, ready and forward business in various commodities in accordance with *pucca adatia* system and according to the usual practice and usage of the various associations concerned. Neither the appellant nor his firm was a member of any recognised association within the meaning of the Act. P.W. 2 placed orders with the appellant and correspondence and statements of accounts were exchanged between the appellant and P.W. 2 who paid a sum of Rs. 12,000 as margin. Subsequent to the demand of P.W. 2 the appellant sent Rs. 1,000 and also a final statement showing loss in the transaction and claiming that a sum of Rs. 398-52 P. was due to the appellant. According to the prosecution case, the appellant induced P.W. 2 to send him Rs. 12,000 between 1st May, 1958 and 15th June, 1958 for forward contract business in cotton, castor-seeds and groundnut by a fraudulent representation that the appellant conducted such business even though he was not actually entitled to do any such business and thereby cheated P.W. 2. The case of the appellant was that he could do business under the *pucca adatia* system with members of recognised associations like the Bombay Oil-seeds and Oil Exchange, and the East India Cotton Association, Bombay though he himself was not a member of either of these associations. The appellant denied that he made any false representation or that he induced P.W. 2 to part with his money. The case of the appellant was rejected by the District Magistrate of Kumbakonam who accepted the prosecution case as true and convicted and sentenced the appellant on all the charges. The decision of the District Magistrate was affirmed by the Sessions Judge, West Thanjavur in appeal.

It was argued in the first place, on behalf of the appellant that on the admitted or proved facts no case of cheating has been made out against the appellant and therefore his conviction under section 420, Indian Penal Code was illegal. We are unable to accept this argument as correct. It has been found that the appellant sent a letter, Exhibit P-34 along with a copy of the business terms, Exhibit 34 (a) "on which we undertake business of our clients". In this document the appellant has made the representation that he could do business in forward contracts in cotton, grains, seeds, bullion, black pepper, etc., in accordance with the *pucca adatia* system and "in accordance with the usual practice and usage of the various associations concerned". In Exhibit P-33 the appellant sent a telegram to P.W. 2 intimating that "buying is advisable for quick profits". The appellant knew fully well that he had no right to do forward business and that he was not a member of any recognised association and that he could not lawfully advertise to P.W. 2 for investment in forward contracts. It is not necessary that a false pretence should be made in express words by the appellant. It may be inferred from all the circumstances including the conduct of the appellant in obtaining the property and in Exhibit P-34 (a) the appellant stated something which was not true and concealed from P.W. 2 the fact that he was not a member of any recognised association and that he

was not entitled to carry on the forward contract business. It is clear that P.W. 2 would not have parted with the sum of Rs. 12,000 but for the inducement contained in Exhibit P-34 and the representation of the appellant that he could lawfully carry on forward contract business.

It was then submitted on behalf of the appellant that the forward contract in the present case was a wagering contract and fell outside the purview of the Act and the provisions of section 15 of that Act were therefore not attracted to this case. In our opinion, there is no justification for this argument. Before setting out the statutory provisions it is desirable to indicate briefly the economic implications of forward trading in commodities, the need for the regulation of such trading and the mischief which the Act was intended to remedy. The expert committee, to which the Bill which became the Act was referred, explained in their Report the meaning of forward trading as follows :

"Forward trading involves speculation about the future, but not all forms of forward trading could be considered as either unnecessary or undesirable for the efficient functioning of anything but the most primitive economy. . . . To the extent to which forward trading enables producers, manufacturers and traders to protect themselves against the uncertainties of the future, and enables all the relevant factors, whether actual or anticipated, local or international, to exercise their due influence on prices, it confers a definite boon on the community, because, to that extent, it minimises the risks of production and distribution and makes for greater stability of prices and supplies. It thus plays a useful role in modern business. At the same time, it must be admitted that this is an activity in which a great many individuals with small means and inadequate knowledge of the market often participate, in the hope of quick or easy gains and consequently, forward trading often assumes unhealthy dimensions, thereby increasing, instead of minimising, the risks of business. There are forms of forward trading for example, options, which facilitate participation by persons with small means and inadequate knowledge. . . . It is, therefore, necessary to eliminate certain forms of forward trading, and permit others under carefully regulated conditions, in order to ensure that, while producers, manufacturers and traders will have the facilities they need for the satisfactory conduct of their business the wider interests of the community, and particularly, the interests of consumers, will be adequately safeguarded against any abuse of such facilities by others."

It was with these objects that the provisions of the Act were enacted.

It is necessary at this stage to set out the relevant provisions of the Act. The object of the Act as stated in the Preamble is "to provide for the regulation of certain matters relating to forward contracts, the prohibition of options in goods and for matters connected therewith". Section 2 (c) of the Act defines a "forward contract" as a contract for the delivery of goods at a future date and which is not a ready delivery contract. Section 2 (i) defines a "ready delivery contract" as a contract which provides for the delivery of goods and the payment of a price therefor, either immediately or within such period not exceeding eleven days after the date of the contract. The statute therefore makes a distinction between "ready delivery contracts" and "forward contracts". Forward contracts are again divided into two categories "specific delivery contracts" and "non-transferable specific delivery contracts". "Specific delivery contracts" mean forward contracts which provide for actual delivery of specific goods at the price fixed during specified future period. "Non-transferable specific delivery contracts" are specific delivery contracts the rights or liabilities under which are not transferable. Section 15 of the Act confers power on the Government to issue notifications declaring illegal forward contracts with reference to such goods or class of goods and in such areas as may be specified. Section 15 states :

"15. (1) The Central Government may, by notification in the Official Gazette, declare this section to apply to such goods or class of goods and in such areas as may be specified in the notification, and thereupon, subject to the provisions contained in section 18, every forward contract for the sale or purchase of any goods specified in the notification which is entered into in the area specified therein otherwise than between members of a recognised association or through or with any such member shall be illegal.

(2) Any forward contract in goods entered into in pursuance of sub-section (1) which is in contravention of any of the bye-laws specified in this behalf under clause (a) of sub-section (3) of section 11 shall be void—

(i) as respects the rights of any member of the recognised association who has entered into such contract in contravention of any such bye-law, and also

(ii) as respects the rights of any other person who has knowingly participated in the transaction entailing such contravention

Section 17 authorises the Government to prohibit by notification any forward contract for the sale or purchase of any goods or class of goods to which the provisions of section 15 have not been made applicable. Section 18 exempts non-transferable specific delivery contracts from the operation of these sections. Section 21 relates to penalties and reads as follows :

"21. Any person who—

(a)

(b)

(c)

(d) not being a member of a recognised association, wilfully represents to, or induces, any person to believe that he is a member of a recognised association or that forward contracts can be entered into or made or performed, whether wholly or in part, under this Act through him, or

(e) not being a member of a recognised association or his agent authorised as such under the rules or bye-laws of such association, canvasses, advertises or touts in any manner, either for himself or on behalf of any other person, for any business connected with forward contracts in contravention of any of the provisions of this Act, or

.....
shall, on conviction, be punishable—

(i) for a first offence, with imprisonment which may extend to two years, or with a fine of not less than one thousand rupees, or with both ;

(ii) for a second or subsequent offence, with imprisonment which may extend to two years and also with fine ; provided that in the absence of special and adequate reasons to the contrary to be mentioned in the judgment of the Court, the imprisonment shall be not less than one month and the fine shall be not less than one thousand rupees."

It was argued on behalf of the appellant that the contracts in this case were not really meant for delivery of goods but were speculative in character. It was contended that to a contract of this description the Act has no application. Mr. Naunit Lal argued that the words of section 2 (c) must be literally construed and must be taken to cover only those contracts in which the parties intended actual delivery of goods at a future date. In our opinion, the interpretation for which Mr. Naunit Lal contends is against the whole scheme and purpose of the Act. If the expression "forward contracts" in section 2 (c) is not construed so as to include speculative contracts which ostensibly are for delivery of goods the provisions of the Act would be rendered nugatory. It is a sound rule of interpretation that a statute should be so construed as to prevent the mischief and to advance remedy according to the true intention of the makers of the statute. In construing therefore section 2 (c) of the Act and in determining its true scope it is permissible to have regard to all such factors as can legitimately be taken into account in ascertaining the intention of the Legislature, such as the history of the statute, the reason which led to its being passed, the mischief which it intended to suppress and the remedy provided by the statute for curing the mischief. That was the rule laid down in *Heydon's case*¹, which was accepted by this Court in *The Bengal Immunity Company Limited v. The State of Bihar and others*².

As we have already pointed out, the Act was passed in order to put a stop to undesirable forms of speculation in forward trading and to correct the abuses of certain forms of forward trading in the wide interests of the community and, in particular, the interests of the consumers for whom adequate safeguards were essential. In our opinion, speculative contracts of the type covered in the present case are included within the purview of the Act. One of the contracts in the present case is Exhibit P-42 in which P.W. 2 placed an order for supply of 100 bales of cotton jarilla to be delivered in August, 1958 at Rs. 654 per candy. We think that a contract of this description falls within the definition of "forward contract"

1. (1584) 3 W. Rep. 16 : 76 E.R. 637. 168 : (1955) 2 S.C.R. 603.

2. (1955) S.C.J. 672 : (1955) 2 M.L.J. (S.C.).

within the meaning of this Act and the provisions of that Act are therefore applicable to this case. We consider that Mr. Naunit Lal has been unable to make good his submission on this aspect of the case.

It was then contended for appellant that even if the Act was applicable there is no breach of the provisions of section 15 because the appellant placed his order for the goods covered by the contract through "a member of the recognised association" as contemplated in section 15 of the Act. The argument was stressed that the appellant was merely acting as an agent of P.W. 2 and had placed an order for the notified goods through a member of the recognised association and there was no breach of any of the provisions of the Act. We are unable to accept this argument as correct. In the first place, there is no evidence on the record of his case to show that the appellant placed the order for the notified goods with a member of the recognised association. But even on the assumption that the appellant placed an order for the notified goods through a member of the recognised association there is, in our opinion, a breach of the provisions of the Act. The reason is that the appellant was doing forward contract business as a *pucca adatia*. It is well-established that the *pucca adatia* has no authority to pledge the credit of the upcountry constituent to the Bombay merchant and there is no privity of contract as between the upcountry constituent and the Bombay merchant. The *pucca adatia* is entitled to substitute his own goods towards the contract made for the principal and buy the principal's goods on his personal accounts. In other words, the *pucca adatia* is not the agent of his constituent but he is acting as a principal as regards his constituent and not as a disinterested middleman to bring two principals together. The legal position has been explained by the Bombay High Court in *Bhagwandas Narotamdas v. Kanji Deoji*¹, and affirmed by the Judicial Committee in *Bhagwandas Parasram v. Burjorji Ruttonji Bomani*². In the present case, therefore, the appellant was acting as principal to principal, so far as P.W. 2 was concerned and the contracts are hit by the provisions of section 15 of the Act.

We pass on to consider the next contention of the appellant that there was a breach of section 361, Criminal Procedure Code, which states:

"361. (1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open Court in a language understood by him.

(2) If he appears by pleader and the evidence is given in a language other than the language of the Court, and not understood by the pleader, it shall be interpreted to such pleader in that language.

....."

It was said that the evidence of the prosecution witnesses was given either in Tamil or in the English language and the appellant did not know either of the languages and so he was not able to take part in the trial. Mr. Naunit Lal contended that there was a breach of the requirement of section 361 (1), Criminal Procedure Code, and the trial was vitiated. We do not think there is any substance in this argument. Even if it is assumed that the appellant did not know English or Tamil the violation of any provision of section 361 (1), Criminal Procedure Code, was merely an irregularity and it is not shown in this case that there is any prejudice caused to the appellant on this account. It is pointed out by the Sessions Judge that the appellant did not make any objection at the time the evidence was given and it appears that he was represented by two eminent Advocates—Sri V. T. Rangaswami Iyengar and Sri R. Krishnamoorthy Iyer—in the trial Court who knew both these languages and who would not have allowed the interest of the appellant to be jeopardised even to the smallest extent. In our opinion, the irregularity has not resulted in any injustice and the provisions of section 537, Criminal Procedure Code, are applicable to cure the defect.

Lastly, it was submitted that the 6 items of alleged cheating were combined together in one charge and the conviction of the appellant is therefore illegal.

1. I.L.R. (1906) 30 Bom. 205.

305 : I.L.R. (1918) 42 Bom. 373.

2. (1918) L.R. 45 I.A. 29 : (1918) 34 M.L.J.

There is no merit in this argument because the lower Courts have found that all the six items of cheating were part and parcel of one transaction and the trial of the appellant on a single charge was therefore permissible under section 239, Criminal Procedure Code.

For the reasons expressed we hold that the decision of the High Court should be affirmed and this appeal should be dismissed.

V.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. N. WANCHOO, J. M. SHELAT AND G. K. MITTER, JJ.

Ammathayi *alias* Perumalakkal and another

... *Appellants**

v.

Kumaresan *alias* Balakrishnan and others

... *Respondents.*

Evidence Act (I of 1872), section 112—Scope and effect.

Hindu Law—Joint family—Gift—Power to gift away ancestral movable or immovable properties—Limitations—Gift by husband to wife of immovable ancestral property—Validity—If becomes valid if made to carry out wishes of the father of the husband—Father-in-law's power to gift ancestral immovable property to daughter-in-law.

Section 112 of the Evidence Act raises *inter alia* a conclusive presumption that a child born during the continuance of a valid marriage between his mother and any man is the legitimate son of that man, and this conclusive presumption can only be rebutted if it is shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

In the instant case the wife was only living one furlong away in her father's house from where the husband was living. The evidence produced falls short of proving that the husband, though living separately, had no access to her at any time when the plaintiff could have been begotten by her.

Hindu law on the question of gifts of ancestral property is well-settled. So far as movable ancestral property is concerned, a gift out of affection may be made to a wife, to a daughter and even to a son, provided the gift is within reasonable limits. A gift for example of the whole or almost the whole of the ancestral movable property cannot be upheld as a gift through affection. But so far as immovable ancestral property is concerned, the power of gift is much more circumscribed than in the case of movable ancestral property. A Hindu father or any other managing member has power to make a gift of ancestral immovable property within reasonable limits for "pious purposes". Now what is generally understood by pious purposes is gift for charitable and/or religious purposes. But the Supreme Court in *Kamala Devi v. Bachu Lal*, (1957) S.C.J. 321 : (1957) 1 An.W.R. (S.C.) 66 : (1957) 1 M.L.J. (S.C.) 66 : (1957) S.C.R. 452, has extended the meaning of pious purposes to cases where a Hindu father makes a gift within reasonable limits of immovable ancestral property to his daughter in fulfilment of an ante-nuptial promise made on the occasion of the settlement of the terms of her marriage and the same can also be done by the mother in case the father is dead. Later in *Guramma v. Malappa*, (1964) 4 S.C.R. 497, it was held that the right to make such a gift is not confined to the marriage occasion alone but can be made at any time.

But a gift by a husband to his wife of immovable ancestral property made out of love and affection would be invalid, for no such gift is permitted under the Hindu law. Such a gift will not become valid merely because in making the gift the husband was merely carrying out the wishes of his father. Even the father-in-law if he had desired to make such a gift at the time of the marriage of his daughter-in-law would not be competent to do so. It is no doubt true that gifts made in token of love by the father-in-law to a daughter-in-law are permitted and become her *stridhan* property. But that does not mean that a father-in-law is entitled to make a gift of ancestral immovable property to a daughter-in-law so as to convert it into her *stridhan*. Generally such gifts are of movable property. But even if gifts of immovable property in such circumstances are possible, the two provisions must be read harmoniously. If therefore Hindu law does not permit a father-in-law to make a gift of ancestral immovable property to his daughter-in-law, he cannot make such a gift for the purpose of *stridhan*. Further if gifts by the father-in-law to the daughter-in-law which become *stridhan* include gifts of immovable property, they can only refer to such immovable property as is not ancestral immovable

property, for that is the only way in which the two provisions can be reconciled. There is therefore no warrant in Hindu law in support of the proposition that a father-in-law can make a gift of ancestral immovable property to his daughter-in-law.

Appeal from the Judgment and Decree dated the 29th November, 1960, of the Madras High Court in Appeal Suit No. 207 of 1957.

Sarjoo Prasad, Senior Advocate (*M. S. Narasimhan*, Advocate, with him), for Appellants.

S. V. Gupte, Solicitor-General of India (*A. G. Ratnaparkhi*, Advocate, with him), for Respondents Nos. 1 and 2.

R. Ganapathy Iyer, Advocate, for Respondent No. 3.

The Judgment of the Court was delivered by

Wanchoo, J.—This is an appeal on a certificate granted by the Madras High Court and arises in the following circumstances. One Rangaswami Chettiar was a man of considerable property and used to live in Poolathur village. He first married one Bappani and had a son by her. But both the son and Bappani died. He therefore married Ammathayee, who was defendant No. 2 in the suit and is appellant No. 1 before us. He had a son and two daughters by her. But unfortunately all the three children died. Thereafter Rangaswami Chettiar married Lakshmiammal in 1943. She was the first defendant in the suit. It appears that no child was born to Lakshmiammal for about three years and therefore Rangaswami Chettiar married a fourth time. His fourth wife was the sister of his second wife named Supputhayee. In February, 1949 Lakshmiammal gave birth to a son. There is dispute as to the question whether Lakshmiammal had left her husband about 1945 or so because of frequent quarrels between the two. Anyhow the fourth wife had also no children. In June, 1953, Rangaswami Chettiar fell ill. He was first treated as an out-patient in Batlagundu hospital and later admitted as an in-patient. On 16th June, 1953, he executed a registered deed of gift in favour of his second wife Ammathayee of certain immovable joint family property. Lakshmiammal when she came to know of this gift published a notice in a newspaper accusing the second and fourth wife of trying to deprive her and her minor son of their due share in the joint family property by having the gift deed executed and claimed that the gift deed was not valid. On 4th September, 1953, Rangaswami Chettiar sent a notice in reply to the notice published by Lakshmiammal. In that notice Rangaswami Chettiar accused Lakshmiammal of having left him a year and a half after the marriage after quarrelling with him. He also accused her of living a life of promiscuity thereafter. Finally he said in the notice that the son born to Lakshmiammal in February, 1949 was not his son. Lakshmiammal gave reply to this notice of Rangaswami Chettiar on 15th September, 1953, in which she maintained that the child was Rangaswami Chettiar's. She also claimed that Rangaswami Chettiar's mind had been poisoned against her by his two other wives. She denied that she had any connection with any other man besides Rangaswami Chettiar. In December, 1953 Rangaswami Chettiar died.

The present suit was filed a year later on 3rd January, 1955, on behalf of the minor son. He claimed half share in the joint family properties left by Rangaswami Chettiar. To this suit the three widows who between them have half share were defendants Nos. 1, 2 and 3. Three other defendants were made parties to the suit to whom we shall refer later as they are not concerned with the main controversy between the plaintiff and the two step-mothers (*i.e.*, second and third defendants).

The main defence of the two step-mothers, who are now appellants before us, was that the plaintiff though born to Lakshmiammal was not the son of Rangaswami Chettiar and was therefore not entitled to any share in his properties. Further Ammathayee pleaded that the gift deed in her favour was valid and that even if the plaintiff was the son of Rangaswami Chettiar he would be entitled to half share of the properties other than those gifted to her by Rangaswami Chettiar before his death. There were other issues in the suit, but we are not concerned with them in the present appeal.

On the main question, namely, whether the plaintiff was the son of Rangaswami Chettiar, the trial Court found in his favour. Further on the question whether the gift deed in favour of Ammathayee was valid, the trial Court was of opinion that it was not competent for Rangaswami Chettiar to make a gift of immovable joint family property to his wife. The trial Court therefore held the gift to be invalid and gave the plaintiff a decree for his half share in the property left by Rangaswami Chettiar, including the properties gifted to Ammathayee before his death.

Thereupon the two step-mothers went in appeal along with two other defendants and contested the finding of the trial Court on both these issues. The High Court however upheld both the findings. On a consideration of the evidence, the High Court came to the conclusion that the heavy burden that lay on those who disputed the paternity of the plaintiff-respondent in view of section 112 of the Indian Evidence Act (I of 1872), had not been discharged in this case and it had not been proved that Rangaswami Chettiar had no access to Lakshmiammal on or about the time when the plaintiff-respondent could have been conceived. On the question of the gift deed, the High Court held that Hindu law did not permit a husband to gift joint family immovable property to his wife in the circumstances in which the gift was made in this case. The High Court therefore dismissed the appeal so far as the step-mothers of the plaintiff-respondent were concerned. The High Court however allowed the appeal of defendants Nos. 4 and 5 who were the brothers of the two step-mothers of the plaintiff-respondent and set aside the decree of the trial Court with respect to them by which they were made accountable. There was also a cross-objection before the High Court with respect to certain properties which were in the possession of the sixth defendant. That cross-objection was dismissed on the ground that the plaintiff-respondent had failed to prove that those properties were joint family properties left by Rangaswami Chettiar. Thereafter the two widows who are the appellants before us applied for and obtained a certificate to appeal to this Court as the decree of the High Court was that of variance, and that is how the matter has come before us.

The two main questions which have been argued before us are—

(i) whether the plaintiff-respondent was the son of Rangaswami Chettiar, and

(ii) whether the deed of gift was valid.

So far as the first question is concerned, there is a concurrent finding of the trial Court as well as of the High Court that the plaintiff-respondent is the son of Rangaswami Chettiar. Ordinarily therefore this Court would not interfere with this concurrent finding of fact. But it is urged that the High Court did not accept the evidence on this point in the same measure as the trial Court did, and that there are circumstances which should have led the High Court (when it did not accept the evidence in full) to hold that the plaintiff-respondent was not the son of Rangaswami Chettiar. It is also urged that the High Court was in error in holding on the basis of section 112 of the Evidence Act that the paternity of the plaintiff-respondent had been proved. We are of opinion that there is no force in this contention. The main evidence on behalf of the plaintiff-respondent was that of his mother, Lakshmiammal. On the other hand the appellants relied on the notice sent by Rangaswami Chettiar to Lakshmiammal denying the paternity of the plaintiff-respondent, and it is urged that a notice of this kind is very strong evidence rebutting the presumption that the plaintiff-respondent is the son of Rangaswami Chettiar, and this is particularly so in the present case because Rangaswami Chettiar was keen on having a son and had married four times for that purpose. He would not have denied the paternity of the son born to his third wife in the circumstances if that was true. The High Court was not oblivious of the force of these circumstances. But the evidence of Lakshmiammal was that she never quarrelled with her husband and that her husband married again because she did not give birth to a child for about three years, and the fourth marriage of Rangaswami Chettiar took place with her consent. She also said that she had not

left the house of Rangaswami Chettiar and that the plaintiff-respondent was Rangaswami Chettiar's son. She further said that her co-wives became jealous after the birth of the plaintiff-respondent to her and that is why they influenced Rangaswami Chettiar against her. This evidence was relied upon by the trial Court and the High Court has not disbelieved it. It is also in evidence that Lakshmiammal was living in her father's house in the same village as Rangaswami Chettiar, even according to the appellants' witnesses and that Lakshmiammal's father's house was only a furlong away from Rangaswami Chettiar's house. It was in these circumstances that the High Court had to consider the question whether the heavy burden which lies on a person denying the paternity of a child born during wedlock had been discharged. It is true that Rangaswami Chettiar had given the notice to Lakshmiammal in which he denied the paternity of the plaintiff-respondent; but that notice stands in no better position than would have been the statement of Rangaswami Chettiar even if he was alive when this suit was fought out in the trial Court. Section 112 is in these terms—

“The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.”

It raises *inter alia* a conclusive presumption that a child born during the continuance of a valid marriage between his mother and any man is the legitimate son of that man, and this conclusive presumption can only be rebutted if it is shown that the parties to the marriage had no access to each other at any time when he could have been begotten. The appellants therefore had to prove, as Rangaswami Chettiar would have had to prove even if he was alive when the suit was fought out in the trial Court, that he had no access to Lakshmiammal at any time when the plaintiff-respondent could have been begotten. We have already said that even according to the appellants Lakshmiammal was only living one furlong away in her father's house from where Rangaswami Chettiar was living. In these circumstances the evidence produced in the present suit falls far short of proving that Rangaswami Chettiar had no access to Lakshmiammal at any time when the plaintiff-respondent could have been begotten. We have therefore no hesitation in agreeing with the High Court, particularly taking into account the evidence of Lakshmiammal which has not been disbelieved by the High Court, that the appellants had completely failed to prove non-access of Rangaswami Chettiar to Lakshmiammal, at any time when the plaintiff-respondent could have been begotten. In these circumstances there is no reason for us to interfere with the concurrent finding of fact as to the paternity of the plaintiff-respondent and we hold that he is the legitimate son of Rangaswami Chettiar.

This brings us to the question of the validity of the gift deed in favour of Ammathayee. The gift deed begins with the following recital:

“As you happened to be my second wife and in accordance with the promise made to you by my father, K. K. Ramasami Chettiar at the time of my marriage with you, and according to the directions given to me also to execute a document in your favour and also in consideration of the affection you are having for me, and your obedient nature”

and then follow the words making the gift of certain immovable properties in her favour. According to the donee-appellant, the value of this immovable property was about one-tenth of the entire property left by Rangaswami Chettiar. The argument on behalf of the donee-appellant is that the gift was valid as it was of a reasonable portion of this immovable property, firstly, because it was made by a husband in favour of a wife out of love and affection, and secondly, because it was made by her husband to carry out the pious obligation that lay on him to fulfil the wishes of his father to make some provision for Ammathayee, which his father had indicated at the time of her marriage.

Hindu law on the question of gifts of ancestral property is well-settled. So far as movable ancestral property is concerned, a gift out of affection may be made to a wife, to a daughter and even to a son, provided the gift is within reasonable

limits. A gift for example of the whole or almost the whole of the ancestral movable property cannot be upheld as a gift through affection: (see Mulla's Hindu Law, 13th Edition, page 252, para. 225). But so far as immovable ancestral property is concerned, the power of gift is much more circumscribed than in the case of movable ancestral property. A Hindu father or any other managing member has power to make a gift of ancestral immovable property within reasonable limits for "pious purposes": (see Mulla's Hindu Law, 13th Edition, para. 226, page 252). Now what is generally understood by "pious purposes" is gift for charitable and/or religious purposes. But this Court has extended the meaning of "pious purposes" to cases where a Hindu father makes a gift within reasonable limits of immovable ancestral property to his daughter in fulfilment of an ante-nuptial promise made on the occasion of the settlement of the terms of her marriage, and the same can also be done by the mother in case the father is dead: (see *Kamala Devi v. Bachu Lal Gupta*¹).

In *Guramma Bhratar Chanbassappa Deshmukh v. Malappa*², it was observed by this Court that

"the Hindu law texts conferred a right upon a daughter or a sister, as the case may be, to have a share in the family property at the time of partition. The right was lost by efflux of time. But it became crystallized into a moral obligation. The father or his representative can make a valid gift by way of reasonable provision for the maintenance of the daughter, regard being had to the financial and other relevant circumstances of the family. By custom or by convenience, such gifts are made at the time of marriage, but the right of the father or his representative to make such a gift is not confined to the marriage occasion..... Marriage is only a customary occasion for such a gift. But the moral obligation can be discharged at any time, either during the life time of the father or thereafter."

But we have not been referred to a single case where a gift by a husband to his wife of immovable ancestral property, if made, has been upheld. We see no reason to extend the scope of the words "pious purposes" beyond what has already been done in the two decisions of this Court to which reference has been made. The contention of the donee-appellant that the gift in her favour by her husband of ancestral immovable property made out of affection should be upheld must therefore fail, for no such gift is permitted under Hindu law insofar as immovable ancestral property is concerned.

As to the contention that Rangaswami Chettiar was merely carrying out his father's wishes when he made this gift in favour of his wife and that act of his was a matter of pious obligation laid on him by his father, we are of opinion that no gift of ancestral immovable property can be made on such a ground. Even the father-in-law, if he had desired to make a gift at the time of the marriage of his daughter-in-law, would not be competent to do so insofar as immovable ancestral property is concerned. No case in support of the proposition that a father-in-law can make a gift of ancestral immovable property in favour of his daughter-in-law at the time of her marriage has been cited. There is in our opinion no authority to support such a proposition in Hindu law. As already observed, a Hindu father or any other managing member has power to make a gift within reasonable limits of ancestral immovable property for pious purposes, and we cannot see how a gift by the father-in-law to the daughter-in-law at the time of marriage can by any stretch of reasoning be called a pious purpose, whatever may be the position of a gift by the father or his representative to a daughter at the time of her marriage. One can understand such a gift being made to a daughter when she is leaving the family of her father. As it is the duty of the father or his representative to marry the daughter, such a gift may be and has been held by this Court to be for a pious purpose. But we see no pious purpose for such a gift by a father-in-law in favour of his daughter-in-law at the time of marriage. As a matter of fact the daughter-in-law becomes a member of the family of her father-in-law after marriage and she would be entitled after marriage in her own right to the ancestral immovable property in certain circumstances, and clearly therefore her case stands on a very

¹ (1957) S.C.J. 321; (1957) 1 An.W.R. 512; 1 M.L.J. (S.C.) 66; (1957) S.C.R. 452.
² (1964) 4 S.C.R. 497.

different footing from the case of a daughter who is being married and to whom a reasonable gift of ancestral immovable property can be made as held by this Court.

Learned Counsel for the donee-appellant further refers to the fact that gifts made in token of love by her father-in-law to a daughter-in-law are permitted and become her *stridhan* property. That is so. But that does not mean that a father-in-law is entitled to make a gift of ancestral immovable property to a daughter-in-law so as to convert it into her *stridhan*. Generally such gifts are of moveable property. But even if gifts of immovable property in such circumstances are possible, the two provisions must be read harmoniously. If therefore Hindu law does not permit a father-in-law to make a gift of ancestral immovable property to his daughter-in-law, he cannot make such a gift for purposes of *stridhan*. Further if gifts by the father-in-law to the daughter-in-law which become *stridhan* include gifts of immovable property, they can only refer to such immovable property as is not ancestral immovable property, for that is the only way in which the two provisions can be reconciled. We have therefore no difficulty in holding that there is no warrant in Hindu law in support of the proposition that a father-in-law can make a gift of ancestral immovable property to a daughter-in-law at the time on her marriage. If that is so, we cannot see how what the father-in-law himself could not do could be made into a pious obligation on the son as is claimed in this case, for that would be permitting indirectly what is not permitted under Hindu law directly. Further in any case gifts of ancestral immovable property can only be for pious purposes, and we doubt whether carrying out the directions of the father-in-law and making a gift in consequence can be said to be a gift for a pious purpose, specially when the father-in-law himself could not make such a gift. We are therefore of opinion that this gift cannot be upheld on the ground that Ranga-swami Chettiar had merely carried out the wishes of his father indicated on the occasion of the marriage of Ammathayee.

The appeal therefore fails and is hereby dismissed with costs to the plaintiff-respondent.

Before we part with this appeal, we should like to refer briefly to the case of Natarajan Chettiar who was defendant No 6 in the trial Court and is respondent No. 3 before us. He was made a party with respect to certain properties in Schedule D to the plaint. His case was that the properties in Schedule D were not liable to be partitioned. This contention of his was upheld by the trial Court. That is why the decree does not provide for partition of D Schedule properties. It was therefore unnecessary for the appellants to make him a party to the present appeal unless the appellants claimed some relief against him. Learned Counsel for the appellants has stated that no relief is being claimed against Natarajan Chettiar, respondent No. 3. The appeal therefore must fail as against Natarajan Chettiar who will get his costs from the appellants but no hearing fee.

Further among the properties to be divided were a gold chain (item 6) and certain promissory notes (items Nos. 2 to 4) of Schedule B. The trial Court held that there was no proof that these items existed. In the decree however this has not been made quite clear. We therefore direct that the trial Court will correct the decree to bring it into line with its finding on these items.

V.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA. (Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO AND V. RAMASWAMI, JJ.

Vemareddi Ramaraghava Reddy and others

... Appellants*

v.

Konduru Seshu Reddy and others

... Respondents.

Madras Hindu Religious Endowments Act (II of 1927), sections 6 (17) and 84 (2)—Order of Endowments Board declaring a temple 'public temple'—Petition to set aside the order—Scope of—Compromise—Deity if represented by the Commissioner-respondent—Decree if binding on deity.

Specific Relief Act (II of 1877), section 42—Mere declaration—If can be granted independently of the section—Compromise in proceedings against the Commissioner, Hindu Religious Endowments—Properties in dispute declared personal properties of the petitioners, subject to annual payments of certain cash and quantity of paddy to the temple—Subsequent suit by a worshipper for a declaration that the deity is not bound—Maintainability—Hindu Religious and Charitable Endowments Act (XIX of 1951), section 93.

Where the Hindu Religious Endowments Board, Madras, passed an order on 5th October, 1949, that Sri Kodandaramaswami Temple was a 'public temple' and where the appellants herein, as petitioners, filed O.P. No. 3 of 1950 on the file of the Court of the District Judge, Nellore, impleading the Commissioner, Hindu Religious Endowments Board, Madras, as defendant, (a) to set aside that order, (b) to declare the temple a 'private temple', and (c) declare the properties detailed in the Schedule thereto do not belong to the temple but are their personal properties, the petition ultimately ended in a compromise in October, 1954 entered into between the Commissioner for Hindu Religious and Charitable Endowments, Andhra Pradesh, and those petitioners and a decree in terms thereof was passed. It provided *inter alia* that the properties were the personal properties of the petitioners subject to payment of certain quantity of paddy and certain cash every year to the temple declared a 'public temple'.

A suit was thereupon filed by a worshipper of the temple on 31st October, 1955, in the District Court, Nellore, for a declaration that the above provision was invalid and not binding on the Deity as it was not represented in the said O.P.; it was dismissed but on appeal the High Court of Andhra Pradesh held that section 93 of the Hindu Religious and Charitable Endowments Act (XIX of 1951) was no bar to the suit and section 42 of the Specific Relief Act was not exhaustive and remanded the suit for disposal on other points: Hence this appeal.

Held, it is well established that a worshipper of a Hindu temple is entitled in certain circumstances to bring a suit for a declaration that the alienation of the temple properties by a *de jure* shebait is invalid and not binding on the temple. Worshippers are not entitled to recover possession of improperly alienated properties but they can be granted a declaratory decree that the alienation is not binding on the Deity.

Section 42 of the Specific Relief Act is not exhaustive of the cases in which a declaratory decree may be made and Courts have power to grant such a decree independently of the requirements of the section.

The Commissioner has no authority to represent the Deity in proceedings before the District Judge under section 85 of the Act. The compromise decree is therefore not binding on the Deity. Further the compromise decree in so far as it relates to the declaration that the properties do not belong to the Deity but are personal to the petitioner is beyond the scope of proceedings brought under section 84 (2) of the Madras Act II of 1927 and could not be granted.

The plaintiff-respondent No. 1 is entitled to a declaratory decree that the compromise decree in O.P. No. 3 of 1950 on the file of the District Court, Nellore, is not valid and binding on the temple.

Appeal from the Judgment and Order dated the 7th August, 1964, of the Andhra Pradesh High Court in Appeal Suit No. 312 of 1957.†

P. Babula, K. Rajendra Chaudhuri and K. R. Chaudhuri, Advocates, for Appellants.

P. Ram Reddy and A. V. V. Nair, Advocates, for Respondent No. 1.

T. V. R. Tatachari, Advocate, for Respondent No. 2.

The Judgment of the Court was delivered by

Ramaswami, J. :—This appeal is brought by certificate on behalf of the defendants against the judgment of the High Court of Andhra Pradesh dated 7th August, 1962, in Appeal Suit No. 312 of 1957.

In the village of Varagali, in the district of Nellore, there is a temple in which is enshrined the idol of Sri Kodandaramaswami. The temple was built in the middle of the last century by one Burla Rangareddi who managed the affairs of the temple and its properties during his life-time. After his death, his son, Venkata Subbareddi was in management. By a deed dated 19th August, 1898, Venkata Subbareddi relinquished his interest in the properties in favour of one Vemareddi Rangareddi whose family members are defendants 1 to 5. The plaintiff filed a petition before the Assistant Commissioner for Hindu Religious Endowments, Nellore, alleging mismanagement of the temple and its properties by the first defendant. Notice was issued to the 1st defendant to show cause why the temple properties should not be leased out in public auction and the first defendant contested the application alleging that the properties were not the properties of the temple but they belonged to his family. After enquiry, the Assistant Commissioner submitted a report to the Hindu Religious Endowments Board, Madras recommending that a scheme of management may be framed for the administration of the temple and its properties. The Board thereafter commenced proceedings for settling a scheme and issued notice to the 1st defendant to state his objections. The 1st defendant reiterated his plea that the temple was not a public temple. The Board held an enquiry and by its order dated 5th October, 1949, held that the temple was a public one. On 18th January, 1950, the 1st defendant filed O.P. No. 3 of 1950 on the file of the District Judge, Nellore (1) for setting aside the order of the Board dated 5th October, 1949, declaring the temple of Sri Kodandaramaswamivari as a temple defined in section 6, clause (17) of the Act, (2) for a declaration that the temple was a private temple and (3) for a declaration that the properties set out in the schedule annexed to the petition were the personal properties of his family and they did not constitute the temple properties. Originally, the Commissioner, Hindu Religious Endowment Board, Madras, was impleaded as the sole respondent in the petition. The present plaintiff later on got himself impleaded as the 2nd respondent therein. Both the respondents contested the petition on the ground that the temple was a public temple and that the properties mentioned in the schedule were the properties of the temple and not the personal properties of the 1st defendant. For reasons which are not apparent on the record the petition was not disposed of for a number of years. In the meantime Madras Act II of 1927 was repealed and the Hindu Religious and Charitable Endowments Act of 1951 was enacted. Then came the formation of the State of Andhra Pradesh. By reason of these changes the Commissioner of Hindu Religious Endowments in the State of Andhra Pradesh was impleaded as the 1st respondent to the petition. Thereafter there was a compromise between the petitioners 1 to 5 on the one hand and the Commissioner, the 1st respondent on the other. The District Judge, Nellore recorded the compromise and passed a decree in terms thereof by his order dated 28th October, 1954.

The material clauses of the compromise decree, Exhibit B-11 are as follows :

" 1. That Sri Kodandaramaswami temple, Varagali, be and hereby is declared as a temple as defined in section 6, clause (17) of the Hindu Religious and Charitable Endowments Act ;

2. That petitioners 1 to 4 be and hereby are, declared as the present hereditary trustees of the said temple ;

3. That the properties set out in Schedule A filed herewith be and hereby are, declared as the personal properties of the family of the petitioners subject to a charge as noted below ;

4. That petitioners 1 to 4 their heirs, successors, administrators and assignees do pay to the said temple for its maintenance 12 1/2 putties of good Mologolukulu paddy and Rs. 600 every year by the 31st of March ;

5. That the said 12 1/2 putties of good Mologolukulu paddy and Rs. 600 due every year be a charge on the lands mentioned in Schedule A given hereunder ;

6. That the petitioners 1 to 4 and their successors, heirs and assignees be liable to pay 12 1/2 putties of Mologolukulu paddy and Rs. 600 every year whether the lands yield any income or not.

* * * * *

10. That the Hindu Religious and Charitable Endowments Commissioner be entitled to associate non-hereditary trustees not exceeding two, whenever they consider that such appointment is necessary and in the interests of the management ;

11. That the Managing trustee shall be one of the four hereditary trustees or their successors in title only and not the non-hereditary trustees ;

* * * * *

15. That the right of the 2nd respondent to agitate the matter by separate proceedings will be unaffected by the terms of this compromise to which he is not a party."

It is apparent from the terms of the compromise decree that the temple was declared to be a public temple as defined in section 6, clause (17) of the Hindu Religious and Charitable Endowments Act and that the properties set out in Schedule A annexed to the compromise petition were declared to be the personal properties of defendants 1 to 5. The decree created a liability on their part to deliver to the temple for its maintenance 12½ putties of paddy and pay Rs. 600 cash every year. The present suit was instituted on 31st October, 1955, for a declaration that the provision in the compromise decree that the lands mentioned in the schedule were the personal properties of defendants 1 to 5 and not the absolute properties of the temple, was not valid and binding on the temple. Defendants 1 to 5 objected to the suit on the ground that it was not open to the plaintiff to seek a declaration that a part of the decree was not binding but the plaintiff should have directed his attack against the entirety of the decree. The trial Court dismissed the suit on the ground that the suit was defective and that section 93 of the Hindu Religious and Charitable Endowments Act of 1951 was a bar to the institution of the suit. Against the decree of the trial Court the plaintiff preferred an appeal—A.S. No. 312 of 1957 to the High Court of Andhra Pradesh. The plaintiff also filed C.M.P. No. 6422 of 1962 praying for amendment of the plaint to the effect that the compromise decree in O.P. No. 3 of 1950 was not valid and binding on the temple. After hearing defendants 1 to 5 the High Court allowed the amendment sought for by the plaintiff and held that the amendment cured the defect with regard to the prayer for a declaration to have the compromise decree set aside partially. The High Court further held that section 93 of the Hindu Religious and Charitable Endowments Act was not a bar to the suit and section 42 of the Specific Relief Act was not exhaustive and the suit was therefore maintainable. In the result, the High Court allowed the appeal and remanded the suit to the trial Court for disposing the same on the remaining issues.

It was contended, in the first place on behalf of the appellants that declaratory suits are governed exclusively by section 42 of the Specific Relief Act and if the requirements of that section are not fulfilled no relief can be granted in a suit for a mere declaration. It was submitted that the plaintiff must satisfy the Court, in such a suit, that he is entitled either to any legal character or to any right in any property. It was argued for the appellants that the plaintiff has brought the suit as a mere worshipper of the temple and that he has no legal or equitable right to the properties of the temple which constitute the subject-matter of the suit. It was pointed out that the plaintiff has not asked for a declaration of his legal character as a worshipper of the temple but he has asked for the setting aside of the compromise decree in O.P. No. 3 of 1950 with regard to the nature of the temple properties. It was contended that in a suit of this description the conditions of section 42 of the Specific Relief Act are not satisfied and the suit is, therefore, not maintainable.

The first question to be considered in this appeal is whether the suit is barred by the provisions of section 42 of the Specific Relief Act which states:

"42. Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief :

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation.—A trustee of property is a 'person interested to deny' a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee."

The legal development of the declaratory action is important. Formerly it was the practice in the Court of Chancery not to make declaratory orders unaccompanied by any other relief. But in exceptional cases the Court of Chancery allowed the subject to sue the Crown through the Attorney-General and gave declaratory judgments in favour of the subject even in cases where it could not give full effect to its declaration. In 1852 the Court of Chancery Procedure Act was enacted and it was provided by section 50 of the Act that no suit should be open to objection on the ground that a merely declaratory decree or order was sought thereby, and it would be lawful for the Court to make binding declarations of right without granting consequential relief. By section 19 of Act VI of 1854, section 50 of the Chancery Procedure Act was transplanted to India and made applicable to the Supreme Courts. With regard to Courts other than the Courts established by Charters the procedure was codified in India for the first time by the Civil Procedure Code, 1859, where the form of remedy under section 19 of Act VI of 1854 was incorporated as section 15 of that Act which stood as follows :

"No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the civil Courts to make binding declarations of right without granting consequential relief."

In 1862 the provisions of the Civil Procedure Code of 1859 were extended to the Courts established by Charters when the Supreme Courts were abolished and the present High Courts were established. In 1877 the Civil Procedure Code, 1859, was repealed and the Civil Procedure Code of 1877 was enacted. The provision regarding declaratory relief was transferred to section 42 of the Specific Relief Act which was passed in the same year. This section which is said to be a reproduction of the Scottish action of *declarator*, has altered and to some extent widened the provisions of section 15 of the old Code of 1859.

It was argued on behalf of the appellants that, in the present case, the plaintiff was suing as a worshipper of the temple and that he was not suing as a person entitled to any legal character or to any right as to any property and so the suit was barred by the provisions of section 42 of the Specific Relief Act.

Upon this argument we think that there is both principle and authority for holding that the present suit is not governed by section 42 of the Specific Relief Act. In *Fischer v. Secretary of State for India in Council*¹, Lord Macnaghten said of this section:

"Now, in the first place it is at least open to doubt whether the present suit is within the purview of section 42 of the Specific Relief Act. There can be no doubt as to the origin and purpose of that section. It was intended to introduce the provisions of section 50 of the Chancery Procedure Act of 1852 (15 & 16 Vict. c. 86) as interpreted by judicial decision. Before the Act of 1852 it was not the practice of the Court in ordinary suits to make a declaration of right except as introductory to relief which it proceeded to administer. But the present suit is one to which no objection could have been taken before the Act of 1852. It is in substance a suit to have the true construction of a statute declared, and to have an act done in contravention of the statute rightly understood pronounced void and of no effect. That is not the sort of declaratory decree which the framers of the Act had in their mind."

In *Partab Singh v. Bhabuti Singh*², the appellants sued for a declaration that a compromise of certain pre-emption suits and decrees passed thereunder made on their behalf when they were minors were not binding on them, having been obtained by fraud and in proceedings in which they were practically unrepresented. The Subordinate Judge having decreed the suit on appeal the members of the Court of the Judicial Commissioner differed upon the question whether the declaration sought should be refused as a matter of discretion under section 42 of the Specific Relief Act. Before the Judicial Committee it was contended for the respondent

1. (1898) L.R. 26 I.A. 16 : I.L.R. 22 Mad. 270 (P.C.).

2. (1913) 25 M.L.J. 492 : L.R. 40 I.A. 182 : I.L.R. 35 All. 487 (P.C.).

that the suit having been filed for the purpose of obtaining a declaratory decree only was bad in form inasmuch as it did not pray that the decree should be set aside; but that, assuming that it was rightly framed in asking only for a declaratory decree, the Court had a discretion as to the granting or refusing such a declaration. The Judicial Committee observed that section 42 of the Specific Relief Act did not apply to the case and that it was not a question of exercising a discretion under that section; and they gave to the appellant a decree setting aside the decree complained of and declaring that the agreement of compromise and the decree complained of were not binding upon the appellants or either of them and that they were entitled to such rights as they had before the suit was dismissed on 15th December, 1899.

It appears to us that a decree of the character which has been sought by the plaintiff in this case is not one as to which the additional powers conferred by the Act of 1852 were required by the Court of Chancery.

The injury complained of was that the Court has, by recording the compromise in O.P. No. 3 of 1950, deprived the deity of its present title to certain trust properties. The relief which the plaintiff seeks is for a declaration that the compromise decree was null and void and if such a declaration is granted the deity will be restored to its present rights in the trust properties. A declaration of this character, namely, that the compromise decree is not binding upon the deity is in itself a substantial relief and has immediate coercive effect. A declaration of this kind was the subject-matter of appeal in *Fischer v. Secretary of State for India in Council*¹ and falls outside the purview of section 42 of the Specific Relief Act and will be governed by the general provisions of the Civil Procedure Code like section 9 or Order 7, rule 7.

On behalf of the respondents reliance was placed on the decision of the Judicial Committee in *Sheoparsan Singh v. Ramnandan Prasad Singh*². In that case, the plaintiff had prayed for a declaration that a will, probate of which had been granted, was not genuine and the Judicial Committee pointed out that under section 42 a plaintiff has to be entitled to a legal character or to a right as to property and that the plaintiffs could not predicate this of themselves as they described themselves in the plaint as entitled to the estate in case of an intestacy, whereas, as things stood, there was no intestacy, since the will had been affirmed by a Court exercising appropriate jurisdiction. The suit was, indeed, nothing more than an attempt to evade or annul the adjudication in the testamentary suit. The suit was held to fail at the very outset because the plaintiffs were not clothed with a legal character or title which would authorise them to ask for the declaratory decree sought by their plaint. There is no reference in this case to the previous decision of the Judicial Committee in *Fischer v. Secretary of State for India in Council*¹. In our opinion, the decision of the Judicial Committee in *Sheoparsan Singh v. Ramnandan Prasad Singh*², should be explained on the ground that the will which was sought to be avoided had been affirmed by a Court exercising appropriate jurisdiction and as the propriety of that decision could not be impeached in subsequent proceedings, the plaintiff, could not sue, not being reversioners.

The legal position is also well-established that the worshippers of a Hindu temple is entitled, in certain circumstances, to bring a suit for declaration that the alienation of the temple properties by the *de jure* shebait is invalid and not binding upon the temple. If a shebait has improperly alienated trust property a suit can be brought by any person interested for a declaration that such alienation is not binding upon the deity but no decree for recovery of possession can be made in such a suit unless the plaintiff in the suit has the present right to the possession. Worshippers of temples are in the position of *cestui que trust* or beneficiaries in a spiritual sense (See *Vidhyapurno Thirithaswami v. Vidhyanidhi Thirithaswami*³). Since the worshippers do not exercise the deity's power of suing to protect its own interests, they are not entitled to recover possession of the property impro-

1. (1898) L.R., 26 I.A. 16 : I.L.R. 22 Mad. I.L.R. 43 Cal. 694 (P.C.).
270 (P.C.).
2. (1916) 31 M.L.J. 77 : L.R. 43 I.A. 91 : 435 at 451.
3. (1904) 14 M.L.J. 105 : I.L.R. 27 Mad.

perly alienated by the shebait, but they can be granted a declaratory decree that the alienation is not binding on the deity (See for example, *Kalyana Venkataramana Ayyangar v. Kasturiranga Ayyangar*¹ and *Ghidambaranatha Thambiran v. Nallasiva Mudaliar*². It has also been decided by the Judicial Committee in *Abdur Rehim v. Mahomed Barkat Ali*³, that a suit for a declaration that property belongs to a wakf can be maintained by Mahomedans interested in the wakf without the sanction of the Advocate-General, and a declaration can be given in such a suit that the plaintiff is not bound by the compromise decree relating to wakf properties.

In our opinion, section 42 of the Specific Relief Act is not exhaustive of the cases in which a declaratory decree may be made and the Courts have power to grant such a decree independently of the requirements of the section. It follows therefore, in the present case that the suit of the plaintiff for a declaration that the compromise decree is not binding on the deity is maintainable as falling outside the purview of section 42 of the Specific Relief Act.

The next question presented for determination in this case is whether the compromise decree is invalid for the reason that the Commissioner did not represent the deity. The High Court has taken the view that the Commissioner could not represent the deity because section 20 of the Hindu Religious and Charitable Endowments Act provided only that the administration of all the endowments shall be under the superintendence and control of the Commissioner. Mr. Babula Reddy took us through all the provisions of the Act but he was not able to satisfy us that the Commissioner had authority to represent the deity in the judicial proceedings. It is true that under section 20 of the Act the Commissioner is vested with the power of superintendence and control over the temple but that does not mean that he has authority to represent the deity in proceedings before the District Judge under section 85 of the Act. As a matter of law the only person who can represent the deity or who can bring a suit on behalf of the deity is the shebait, and although a deity is a juridical person capable of holding property, it is only in an ideal sense that property is so held. The possession and management of the property with the right to sue in respect thereof are, in the normal course, vested in the shebait, but where, however, the shebait is negligent or where the shebait himself is the guilty party against whom the deity needs relief it is open to the worshippers or other persons interested in the religious endowment to file suits for the protection of the trust properties. It is open, in such a case, to the deity to file a suit through some person as next friend for recovery of possession of the property improperly alienated or for other relief. Such a next friend may be a person who is a worshipper of the deity or as a prospective shebait is legally interested in the endowment. In a case where the shebait has denied the right of the deity to the dedicated properties, it is obviously desirable that the deity should file the suit through a disinterested next friend nominated by the Court. The principle is clearly stated in *Pranath Nath v. Pradyumn Kumar*⁴. That was a suit between contending shebaites about the location of the deity, and the Judicial Committee held that the will of the idol on that question must be respected, and inasmuch as the idol was not represented otherwise than by shebaites, it ought to appear through a disinterested next friend appointed by the Court. In the present case no such action was taken by the District Court in O.P. No. 3 of 1950 and as there was no representation of the deity in that judicial proceeding it is manifest that the compromise decree cannot be binding upon the deity. It was also contended by Mr. P. Rama Reddy on behalf of respondent No. 1 that the compromise decree was beyond the scope of the proceedings in O.P. No. 3 of 1950 and was, therefore, invalid. In our opinion this argument is well-founded and must prevail. The proceeding was brought under section 84 (2) of the old Act (II of 1927) for setting aside the order of the Board, dated 5th October, 1949, declaring the temple of Shri Kodandaramaswami as a temple defined in section 6 clause (17) of the Act and for a declaration that the

1. (1916) 31 M.L.J. 777 : I.L.R. 40 Mad. 212.
2. (1917) 33 M.L.J. 357 : I.L.R. 41 Mad. 124.
3. (1928) 54 M.L.J. 609 : L.R. 55 I.A. 96 :

I.L.R. 55 Cal. 519 (P.C.).

4. (1925) 49 M.L.J. 30 : L.R. 52 I.A. 245 :
I.L.R. 52 Cal. 809 (P.C.).

temple was a private temple. After the passing of the new Act, namely, Madras Act XIX of 1951, there was an amendment of the original petition and the amended petition included a prayer for a further declaration that the properties in dispute are the personal properties of the petitioner's family and not the properties of the temple. Such a declaration was outside the purview of section 84 (2) of Madras Act II of 1927 and could not have been granted. We are, therefore of the opinion that the contention of respondent No. 1 is correct and that he is entitled to a declaratory decree that the compromise decree in O. P. No. 3 of 1950 was not valid and was not binding upon Sri Kodandaramaswami temple.

We have gone into the question of the validity of the compromise decree because both the parties to the appeal invited us to decide the question and said that there was no use in our remanding the matter to the trial Court on this question and the matter will be unduly protracted.

For the reasons expressed, we hold that the decree passed by the trial Court should be set aside and the plaintiff-respondent No. 1 should be granted a declaratory decree that the compromise decree in O.P. No. 3 of 1950 on the file of the District Court, Nellore is not valid and binding on Sri Kodandaramaswami temple. Subject to this modification, we dismiss this appeal. The parties will bear their own costs throughout.

K.S.

Declaration granted; appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, V. RAMASWAMI AND P. SATYANARAYANA RAJU, JJ.

P. L. Bapuswami

.. *Appellant**

v.

N. Pattay Gounder

.. *Respondent.*

Transfer of Property Act (IV of 1882), section 58 (c)—Mortgage by conditional sale—Sale with a condition for re-transfer—Distinction between—Test to determine.

Practice—Second Appeal—Concurrent finding of fact—No power to interfere.

The suit document, in the form of a deed of sale, contained in itself a stipulation that on payment after five years and within 7 years, of the price recited Rs. 4,000 the property should be reconveyed

On the question whether it was a mortgage by conditional sale or a sale with a condition for re-transfer :

Held: Section 58 (c) of the Transfer of Property Act postulates the creation by the transfer of a relationship of mortgagor and mortgagee the price being charged on the property conveyed ; in a sale with a covenant for re-transfer there is no relationship of a debtor and creditor, nor is the price charged upon the property conveyed but the sale is subject to an obligation to retransfer it within the period specified ; the distinction between the two is the existence or otherwise of the relationship of debtor and creditor and the transfer being a security for the debt.

A document of ostensible sale to be deemed a mortgage as defined in section 58 (c) must embody any of the conditions specified therein in the document itself (*vide* proviso to the section). Even when it is so incorporated in the deed, the question whether it can be regarded as a mortgage is one of intention of the parties to be gathered from the language of the deed interpreted in the light of surrounding circumstances.

The High Court in Second Appeal cannot interfere with the concurrent finding of fact that the value of the property conveyed is Rs. 8,000.

In the instant case, the document itself provided that on payment of the price mentioned in the deed (Rs. 4,000)—though the property was worth Rs. 8,000—and that within the specified period, the property has to be retransferred and further this condition is not valid beyond the period ; further there

were these circumstances : (i) that the transferee did not obtain a transfer of patta and (ii) the transferor himself was paying the kist all these years ; the true effect of the document on its language and examined in the light of the above circumstances is that the transaction is a mortgage by conditional sale.

Appeal by Special Leave from the Judgment and Order dated the 19th August, 1960, of the Madras High Court in Second Appeal No. 871 of 1958.

R. Ganapathy Iyer, Advocate, for Appellant.

C. B. Agarwala, Senior Advocate (*R. Gopalakrishnan*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Ramaswami, J.—This appeal is brought, by Special Leave, on behalf of the plaintiff from the judgment of the High Court of Madras dated 19th August, 1960, in Second Appeal No. 871 of 1958.

The disputed property consisted of 16 acres and 27 cents of land in Sokkanur village of Coimbatore district of which half share belonged to Palani Moopan and the other half to his daughter Palani Mooppachi. Palani Moopan executed the document—Exhibit B-1 with regard to his share of the property in favour of the 1st defendant for a consideration of Rs. 4,000 on 28th May, 1946. Out of the consideration, a sum of Rs. 2,000 was reserved with the vendee to pay off an earlier mortgage and the balance of Rs. 2,000 was paid to the vendor in cash. The first defendant discharged the earlier mortgage in accordance with the directions in Exhibit B-1. The document, B-1 was in the form of a sale deed but it contained a stipulation that the 1st defendant should reconvey the property to Palani Moopan on his repaying the amount of Rs. 4,000 after 5 years and before the end of the 7th year. After the death of Palani Moopan his sons executed an assignment deed in favour of the plaintiff, Exhibit A-1 dated 10th August, 1950, for a sum of Rs. 1,600. On the basis of Exhibit A-1 the plaintiff has brought the present suit for redemption of the disputed property. The case of the plaintiff was that Exhibit B-1 must be deemed in law to be a mortgage by conditional sale and that he was entitled to redeem as the assignee of the equity of redemption. The plaintiff further claimed that being an agriculturist he was entitled to the benefits of Madras Act IV of 1938 as amended. The plaintiff pleaded alternatively that if Exhibit B-1 was held to be an outright sale with a condition to repurchase, the first defendant was bound to reconvey the property to him on payment of the amount of Rs. 4,000. The plaintiff alleged that he tendered the amount to the first defendant several times but the latter refused to accept the same. The suit was contested by the 1st defendant who denied that Exhibit B-1 was a mortgage by conditional sale. It was alleged that Exhibit B-1 was an outright sale with a covenant to repurchase and as no tender was made by the plaintiff within the time stipulated in the document, the suit was barred by time.

Upon these rival contentions the trial Court held that Exhibit B-1 was a mortgage by conditional sale and accordingly granted a preliminary decree to the plaintiff for redemption under Order 34, rule 7 of the Civil Procedure Code. The first defendant took the matter in appeal to the Subordinate Judge of Coimbatore but the appeal was dismissed. The 1st defendant preferred Second Appeal in the Madras High Court which set aside the decrees of the lower Courts and ordered that the suit should be dismissed, holding that the transaction was an outright sale and not a mortgage by conditional sale. As regards the alternative plea based on the covenant for reconveyance, the High Court considered that there was no proof that the plaintiff had tendered the amount within the period stipulated in the document.

The question of law involved in this appeal is whether the document, Exhibit B-1 executed by Palani Moopan in favour of the 1st defendant is, in its true effect, a mortgage by conditional sale or a sale with a condition for retransfer.

By section 58 (c) of the Transfer of Property Act a mortgage by conditional sale is defined as follows :

"58. (c) Where the mortgagor ostensibly sells the mortgaged property—
 on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or
 on condition that on such payment being made the sale shall become void, or
 on condition that on such payment being made the buyer shall transfer the property to the seller,
 the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale :

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale."

The proviso to this clause was added by Act XX of 1929. Prior to the amendment there was a conflict of decisions on the question whether the condition contained in a separate deed could be taken into account in ascertaining whether a mortgage was intended by the principal deed. The Legislature resolved this conflict by enacting that a transaction shall not be deemed to be a mortgage unless the condition referred to in the clause is embodied in the document which effects or purports to effect the sale. But it does not follow that if the condition is incorporated in the deed effecting or purporting to effect a sale a mortgage transaction must of necessity have been intended. The question whether by the incorporation of such a condition a transaction ostensibly of sale may be regarded as a mortgage is one of intention of the parties to be gathered from the language of the deed interpreted in the light of the surrounding circumstances. The definition of a mortgage by conditional sale postulates the creation by the transfer of a relation of mortgagor and mortgagee, the price being charged on the property conveyed. In a sale coupled with an agreement to reconvey there is no relation of debtor and creditor nor is the price charged upon the property conveyed, but the sale is subject to an obligation to retransfer the property within the period specified. The distinction between the two transactions is the relationship of debtor and creditor and the transfer being a security for the debt. The form in which the deed is clothed is not decisive. The question in each case is one of determination of the real character of the transaction to be ascertained from the provisions of the document viewed in the light of surrounding circumstances. If the language is plain and unambiguous it must in the light of the evidence of surrounding circumstances be given its true legal effect. If there is ambiguity in the language employed, the intention may be ascertained from the contents of the deed with such extrinsic evidence as may by law be permitted to be adduced to show in what manner the language of the deed was related to existing facts. In the present case, the document Exhibit B-1 reads as follows :—

".....
 I have settled to sell to you on this day for a sum of Rs. 4,000 the undermentioned immovable properties and have received the consideration of rupees four thousand only, as detailed below :—

In the matter of my having directed you yourself to pay the sum of Rs. 2,000, being my half share payable towards the usufructuary mortgage deed executed on 7th September, 1944, in respect of the share of properties detailed below and in respect of some other share of properties, jointly by me and Palani Mooppachi, wife of one Palani Mooppan of the aforesaid place in favour of M. Maniyam P. V. Ramaswami Goundar, son of Venkatachala Gounder, residing in Pattaupalayam village cusba, Palladam taluk, for a sum of Rs. 4,000 and registered as Document No. 1122 of 1944, Book 1, Volume 210, pages 415 and 416 in the Office of the Sub-Registrar of Kunnathur to the aforesaid usufructuary mortgagee, get release of the properties mentioned herein and take possession of the same, the amount received by me is Rs. 2,000. The amount which I have received in cash on this day is Rs. 2,000. As, in all, I have received the sale consideration of Rs. 4,000 as detailed above, you yourself shall, in future, hold and enjoy absolutely the undermentioned properties. In future, neither myself nor my heirs shall have any right or future claim, whatever in respect of these properties. There is no other encumbrance whatever, except the encumbrance mentioned above, in respect of these properties. In case anything is left out, I am bound to get the same discharged from and out of my other properties.

.....
 Whereof, in all these, and in the well in good condition, situate in Government Survey No. 93/1 and in the cocoanut, palmyrah, tamarind and wood-apple trees and in the fruit bearing and timber trees, which are in the aforesaid fields, the half-share in common. In future I have neither share nor right, whatever, in the aforesaid fields. The aforesaid Palani Mooppachi shall discharge the above mentioned balance usufructuary mortgage amount of Rs. 2,000 from and out of the balance of the usufructuary of mortgage properties. Should I pay in cash the aforesaid sale consideration of rupees

four thousand after a period of five years within a period of seven years from the date of the execution of the deed, during the date of expiry of the said deed of any year (the said properties) should be reconveyed for the very same amount to me. This condition is not valid after the aforesaid period."

We consider that in the present case there are several circumstances to indicate that Exhibit B-1 was a transaction of mortgage by conditional sale and not a sale with a condition for retransfer. In the first place, there is the important circumstance that the condition for repurchase is embodied in the same document. In the second place, there is the significant fact that the consideration for Exhibit B-1 was Rs. 4,000, while the real value of the property was, according to the Munsif and the Subordinate Judge, Rs. 8,000. The High Court has dealt with this question and reached the finding that the value of the property was Rs. 5,500, but it is submitted by Mr. Ganapathi Iyer on behalf of the appellant that the question of valuation was one of fact and the High Court was not entitled to go into the question in the Second Appeal. The criticism of learned Counsel for the appellant is justified and we must proceed on the basis that the valuation of the property was Rs. 8,000 and since the consideration for Exhibit B-1 was only Rs. 4,000 it was a strong circumstance suggesting that the transaction was a mortgage and not an outright sale. In the third place, there is the circumstance that the patta was not transferred to the 1st defendant after the execution of Exhibit B-1 by Palani Moopan. It appears that defendant No. 1 did not apply for the transfer of patta and the patta admittedly continued in the name of Palani Moopan even after the execution of Exhibit B-1. Exhibits A-6 and A-7 are certified copies of thandal extract of patta for the years 1945-54 and they prove this fact. These exhibits also show that the plaintiff had obtained patta for the land on the basis of Exhibit A-2. The registered deed of transfer of patta was executed by the sons of Palani Moopan in favour of the plaintiff. There is also the circumstance that the kist for the land was continued to be paid by Palani Moopan and after his death, by the sons of Palani Moopan. Lastly, there is the important circumstance that the consideration for reconveyance was Rs. 4,000, the same amount as the consideration for Exhibit B-1. Having regard to the language of the document, Exhibit B-1 and examining it in the light of these circumstances we are of the opinion that the transaction under Exhibit B-1 was mortgage by conditional sale and the view taken by the High Court with regard to the legal effect of the transaction must be reversed. It follows, therefore, that the plaintiff is entitled to a preliminary decree for redemption under Order 34, rule 7, Civil Procedure Code, for taking accounts and for declaration of the amounts due to the 1st defendant under Exhibit B-1.

For these reasons we set aside the judgment and decree of the High Court and restore the judgment and decree of the Subordinate Judge of Coimbatore granting the plaintiff a preliminary decree for redemption of the mortgage. A period of six months is granted for payment of the amount under the preliminary decree.

The appeal is accordingly allowed with costs.

K.G.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO AND V. RAMASWAMI, JJ.

The Tirunagar Panchayat

.. *Appellant**

v.

The Madurai Co-operative House Construction Society

.. *Respondent.*

Madras Village Panchayats Act (X of 1950), section 58—Scope—Parks, playgrounds, schools, club, etc.—Amenities to residents of village by House Construction Society—If vest in the Panchayat of the village.

Section 58 of the Madras Village Panchayats Act, provides for the vesting of two kinds of property or income : (i) property or income which *by custom* belongs to the villagers in common or the holders in common of the village land generally or of lands of a particular description. (ii) property or income which has been administered *by custom* for the benefit of the villagers in common or the holders in the common of village land generally or of lands of particular description.

Having regard to the grammatical structure and the context the expression '*by custom*' qualifies both the categories of property or income. Only such property and income to which the villagers have obtained title as a matter of custom or which has been administered for the benefit of the villagers in common would vest in the Panchayat of the village.

Dedication is not a relevant circumstance in considering the scope and meaning of the section. The section cannot be extended to include parks, playgrounds, hospital, schools library, club, etc. provided by the House Construction Society for the benefit of members, of the Tirunagar Colony.

Appeal by Special Leave from the Judgment and Decree dated the 9th August, 1963 of the Madras High Court in L.P.A. No. 45 of 1962.

A. V. Narayanaswami Iyer and *S. Venkatakrishnan*, Advocates, for Appellant.

A. K. Sen, Senior Advocate (*N. Natesan* and *R. Ganapathy Iyer*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Ramaswami, J.—This appeal is brought, by Special Leave, from the judgment and decree of the Madras High Court dated 9th August, 1963 in Letters Patent Appeal No. 45 of 1962.

The suit which is the subject-matter of this appeal was filed by the Tirunagar Panchayat, hereinafter called the 'Panchayat', against the Madurai Co-operative House Construction Society (hereinafter called the 'Society') in the District Munsif's Court of Tirumangalam. The Tirunagar Colony has been formed by the Society. The Colony consists of about 300 houses and its total population exceeds 1,500. At its inception the colony was within the jurisdiction of the Tirupparankundram Panchayat. On 21st February, 1955 the Tirunagar Colony was excluded from Tirupparankundram Panchayat and was declared as a separate village and was constituted as a separate Panchayat known as Tirunagar Panchayat. In the formation of the colony the Society has laid out and set apart and formed public roads, parks, playgrounds and other public common places. There was a change in the Board of Directors of the defendant-Society and as a consequence of this change the Society passed a resolution on 23rd July, 1956 cancelling its previous resolution handing over the roads, streets and scavenging arrangements to the Panchayat. The Panchayat therefore filed a suit—O.S. No. 38 of 1957, in the District Munsif's Court of Tirumangalam for an injunction restraining the Society and its servants from obstructing and interfering with its lawful exercise of statutory duties relating to the roads and streets in Tirunagar and cleaning of latrines, public and private, lighting the houses and roads and making arrangements for the civic needs of the village of Tirunagar. The Society contested the suit on the ground that the constitution of the Panchayat was illegal as the provisions of the Madras Village Panchayats Act (Madras Act X of 1950), hereinafter to be called the 'Act', had not been complied with. The Society also contended that the public cannot use the roads or streets as a matter of right, that the entire colony was a closed one and no outsider except the members of the Society had the right to enter the colony and that the parks, central oval, playgrounds and open spaces were the exclusive properties of the Society. The contentions of the Society were all overruled by the trial Court and a permanent injunction was granted to the plaintiff-Panchayat, as prayed for. The decision of the trial Court was affirmed by the Subordinate Judge of Madurai in A.S. No. 92 of 1958. The Society took the matter in Second Appeal to the High Court. The appeal was partly allowed by Ramakrishnan, J., who held that the

streets and roads in Tirunagar Colony alone would vest in the Panchayat and that the injunction passed by the lower appellate Court should be confined only to streets and roads in the colony and should not be extended to any other place like the parks, oval park, playgrounds, schools, library or club and such other amenities which the Society had provided for the residents of the colony. The decision of Ramakrishnan, J., was affirmed by the High Court in Letters Patent Appeal and the injunction granted by the lower Courts was accordingly confined to roads and streets and the cleaning of public and private latrines, and the decree of the lower Courts was set aside so far as the injunction related to the parks, play grounds, bus-stand and other public places.

The question presented for determination in this appeal is whether there is a statutory vesting in the Panchayat of the parks, playgrounds, schools, libraries and other public places which the Society provided for its members and whether the Panchayat is entitled to a permanent injunction restraining the Society and its servants in the manner decreed by the trial Court.

On behalf of the appellant reference was made to sections 56 and 58 of the Act relating to vesting of the property in the Panchayat. Section 56 of the Act reads as follows :

"56. (1) All public roads in any village (other than district roads and roads which are classified by the Government as National or State highways), shall vest in the panchayat together with all pavements, stones and other materials thereof, all works, materials and other things provided therefor, all sewers, drains, drainage works, tunnels and culverts, whether made at the cost of the panchayat fund or otherwise, in, alongside or under such roads, and all works, materials and things appertaining thereto."

Section 58 is to the following effect :

"Any property or income which by custom belongs to, or has been administered for the benefit of, the villagers in common, or the holders in common of village land generally or of lands of a particular description or of lands under a particular source of irrigation shall vest in the panchayat and be administered by it for the benefit of the villagers or holders aforesaid."

The Rules framed under the Co-operative Societies Act for the formation of House Building Societies required that when an area is set apart for a residential colony provisions for schools, markets, theatres, hospitals, clubs, religious places, etc., should be made in the layout. Reference was made, on behalf of the appellant, to the layout plan Exhibit A-44 for the Tirunagar Housing Colony. There is evidence in this case that the Government had assigned to the House Building Society free of cost an area of about 5 acres for the proposed public amenities like schools, markets, etc. It was submitted on behalf of the appellant that the parks, playgrounds, hospitals, schools, etc. of the Tirunagar Housing Colony would vest in the Panchayat under section 58 of the Act. We do not consider that there is any justification for this argument. Under section 56 of the Act all 'public roads' in any village shall vest in the Panchayat together with all pavements, stones and other materials thereof, all sewers, drains, drainage works, tunnels and culverts, whether made at the cost of the panchayat fund or otherwise. Under section 2 (20) of the Act a 'public road' means "any street, road, square, Court, alley, passage, cart-track, footpath or riding path, over which the public have a right of way". Section 58 of the Act provides for vesting of the communal property in the panchayat. By this section the Legislature has provided that any property or income which by custom belongs to the villagers in common, or the holders in common of village land generally or of lands of a particular description shall vest in the panchayat. The Legislature has further provided in this section that any property or income which by custom has been administered for the benefit of the villagers in common or the holders in common of village land generally or of lands of a particular description shall vest in the panchayat and be administered by it for the benefit of the villagers or the holders aforesaid. In enacting section 58 of the Act the Legislature has made a provision for vesting of two kinds of property or income : (1) property or income which by custom belongs to the villagers in common or the holders in common of village land generally or lands of a particular description and (2) property or income which has been adminis-

tered by custom for the benefit of the villagers in common or the holders in common of village land generally or of lands of a particular description. Having regard to the grammatical structure and the context, we are of opinion that the expression "by custom" qualifies not only the property or income which belongs to the villagers but also property and income which has been administered for the benefit of the villagers in common. It is manifest that section 58 provides for the vesting of such property and income to which the villagers have acquired title as a matter of custom or which has been administered for the benefit of the villagers as a matter of custom. It was argued on behalf of the appellant that if parks or playgrounds or markets had been dedicated to the public the Panchayat would acquire title to such properties under section 58 of the Act. We do not think that dedication is a relevant circumstance in considering the scope and meaning of section 58 of the Act. In the enactment of this section the Legislature did not contemplate that parks, playgrounds, schools or temple or hospital dedicated to the public should vest in the Panchayat merely by the fact of such dedication. What is required by section 58 for the purpose of vesting is the proof of custom by which the villagers in common acquire title to any property or income. Vesting of rights takes place under section 58 if there is proof of customary right of administration of any property or income for the benefit of the villagers in common. Unless therefore there is proof of customary right, the Panchayat cannot claim title to the property or income administered for the benefit of the villagers in common. For example, the Society may have established a library or a social club or a school for the benefit of its members. Again, a private individual may have created a trust for the provision of amenities like parks, playgrounds and hospitals for the residents of the village. In a case of this description the legal ownership of the Society or of the trustees will not vest in the Panchayat because of the provisions of section 58 of the Act. It cannot be supposed that such a startling and unjust result was contemplated by the Legislature in enacting section 58. We are accordingly of the opinion that the scope of section 58 of the Act must be confined to communal property and income of the Panchayat which by custom belongs to the villagers in common or has been administered for their benefit as a matter of custom, and the scope of that section cannot be extended to include parks, playgrounds, hospitals, libraries and schools provided by the Society for the benefit of the members of the Tirunagar Colony.

For these reasons we hold that the judgment and decree of the High Court in Letters Patent Appeal No. 45 of 1952 is correct and this appeal must be dismissed with costs.

K.G.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO AND V. RAMASWAMI, JJ.

Maturi Pullaiah *alias* Naga Pullaiah and another

.. *Appellants**

v.

Maturi Narasimham and others

.. *Respondents.*

Family arrangement—What constitutes—Two brothers—Agreement in writing, allotting 3 shares to one and 2 shares to the other in partition—Not registered—Partition in future contemplated—Validity—Registration Act (XVI of 1908), section 17 (1) (b).

The facts and circumstances under which the agreement Exhibit B-1 was brought into existence, found by both the Courts below, were as follow : Narasimham, N, the first defendant and Venkataramiah, V, the father of the plaintiff are sons of one Venkaiah. The properties of the family were the self-acquisition of the father. N helped the father in the acquisition thereof. The father directed that a greater share be given to N, 1st respondent, at a partition in the family. Some properties had been purchased in the name of N by the father. After the death of the father, N wanted a division

of the properties and claimed a greater share. It was in 1931. *V* prevailed upon his younger brother to continue joint and manage the family business and properties as before for six years more and promised to give him 3 shares and himself take 2 shares at a partition thereafter. In 1939 *N* wanted partition on the above terms but his elder brother requested him to continue as before and an agreement was entered into and reduced to writing reciting the above facts and a division at some future time when *N* will take 3 shares and *V* 2 shares in the properties then existing and those that may be acquired thereafter. But that agreement remained unregistered.

The points for decision in this appeal are (i) whether the said agreement constitutes a family arrangement and (ii) whether it is valid though unregistered.

Held, though conflict of legal claims *in praesenti* or *in futurum* is generally a condition for the validity of a family arrangement, it is not necessarily so. Even *bona fide* disputes, present or possible, which may not involve legal claims will suffice. Members of a joint Hindu family may, to maintain peace and to bring about harmony in the family, enter into such a family arrangement. If such an arrangement is entered into *bona fide* and the terms thereof are fair in the circumstances of a particular case, Courts will more readily give assent to it than to avoid it.

Agreeing with the Courts below, it was therefore held that Exhibit B-1 entered into under the fact^s and the circumstances above stated, was a family arrangement binding on the members of the family.

It is common case that the document did not bring about a division by metes and bounds between the parties. It did not affect the interests of the parties in immovable properties *in praesenti*. Its terms relating to shares would come into effect only in future if and when division takes place. It follows the document Exhibit B-1 is not hit by section 17 of the Registration Act.

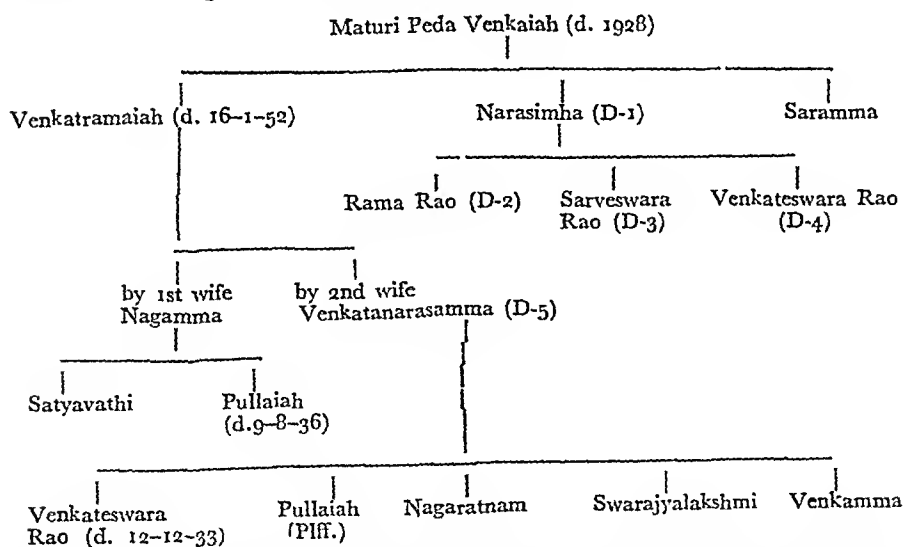
Appeal from the Judgment and Decree dated the 23rd January, 1961 of the Andhra Pradesh High Court in Appeal Suit No. 184 of 1956.

A. K. Sen, Senior Advocate (*K. R. Sharma*, Advocate, with him), for Appellants.

Sarjoo Prasad, Senior Advocate (*K. S. Ranganaiakulu* and *T. Satyanarayana*, Advocates, with him), for Respondents Nos. 1 to 4.

The Judgment of the Court was delivered by

Subba Rao, J.—This appeal mainly raises the question of the factum and validity of a family arrangement alleged to have been effected between the members of a joint Hindu family. The following genealogy will be useful to appreciate the contentions of the parties :—



Peda Venkaiah, Venkateswara Rao, Pullaiah the son of Venkatramaiah by his first wife, and Venkatramaiah died in 1928, 1933, 1936 and 1952 respectively. Peda Venkaiah had no ancestral property; all his properties were his self-acquisitions. His eldest son, Venkatramaiah, was not an intelligent man, though he was good enough to look after the cultivation of the lands. His younger son, Narasimha

was an able man in whom the father had confidence and though, he was the younger son, he was helping his father in the management of the family affairs and indeed even during his father's lifetime many properties were purchased in his name. After the death of the father, Narasimha was in charge of the management of the money-lending business and the business at Eluru and was also looking after the Court affairs. During the course of his management large extent of properties were purchased in his name. After the death of Venkatramaiah in 1952, disputes arose between Narasimha and Venkatramaiah's son, Pullaiah, which led to the filing of O.S. No. 69 of 1952 by Pullaiah in the Court of the District Judge, Eluru, against Narasimha and his sons and others for partition of the joint family property by metes and bounds. He impleaded Narasimha and his sons as defendants 1 to 4 and his mother, as defendant 5. The other defendants were persons who had joint interest in some of the family properties.

The suit came up before the Subordinate Judge, Eluru, and it was renumbered as O.S. No. 86 of 1954. Defendants 1 to 4 mainly contested the suit on the ground that under the family arrangement the 1st defendant was given three shares in the joint family properties and Venkatramaiah was given two shares therein and that all the properties standing in the name of the 1st defendant were his self-acquisitions.

The learned Subordinate Judge, on a consideration of the entire oral and documentary evidence, held that the properties standing in the name of the 1st defendant were also joint family properties and that Exhibit B-1, dated 4th November, 1939, embodied a family arrangement effected between Venkatramaiah and Narasimha whereunder the 1st defendant's branch would be entitled to 3 shares and the branch of Venkatramaiah would be entitled to 2 shares in all the joint family properties and that the said family arrangement was valid and binding on the plaintiff. In the result he gave a decree to the plaintiff for two-fifths of the joint family properties. It is not necessary to notice the other findings given by the learned Subordinate Judge, as nothing turns upon them in this appeal.

On appeal, a Division Bench of the Andhra Pradesh High Court confirmed the view of the learned Subordinate Judge both on the factum and the validity of the family arrangement. Hence the present appeal.

Mr. A. K. Sen, learned Counsel for the appellants, contended that while in the written statement the 1st defendant pleaded a family arrangement alleged to have been entered into between him and the plaintiff's (1st appellant herein) guardian, after the death of Venkatramaiah, both the Courts went wrong in holding that there was a family arrangement between Venkatramaiah and Narasimha in 1939 on the basis of Exhibit B-1. He further contended that Exhibit B-1 could not in law sustain the family arrangement as there were no conflicting claims between the parties which could have been resolved by a family arrangement.

The first contention turns upon the pleadings and the issues framed thereon. In paragraphs 4, 5, 6 and 7 of the written statement, the 1st defendant stated how his father before his death gave directions that when the family properties were divided between him and Venkatramaiah such additional property as might be fixed by their mother should be given to him, how after his father's death Venkatramaiah requested him to manage the family properties as he was doing before and promised that he would give him such extra property, how in 1931, when he fell ill, he insisted upon a partition and for giving him his extra property, and Venkatramaiah again requested him not to disrupt the family but to continue the management as before on the promise that when the partition was effected his branch would take only 2 shares and the 1st defendant's branch would take 3 shares of the joint family properties, how thereafter he continued to manage the properties as he was doing before and improved them, how in 1931 Venkatramaiah asked him to be joint at least for 6 more years and to have the aforesaid shares in the properties when they entered into a partition thereafter and how in 1939 the said oral arrangement to divide the properties in the said shares was embodied in a document. After the said recitals, in paragraph 9, he proceeded to state:

"It is also on the basis of this agreement, which is also a family arrangement that the 1st defendant continued to work as before and improved the family property. But for this family arrangement, he would have got the family properties divided long ago and would have claimed the property acquired by him in his own name as his self-acquisition. It is because of this family arrangement and agreement that the 1st defendant continued to be joint and worked hard and agreed that the property acquired by him might be divided at the partition."

In addition to the said family arrangement, he pleaded another family arrangement after the death of Venkatramaiah between himself and the plaintiff represented by his mother as guardian. That arrangement is stated in paragraph 13 of the written statement. After stating all the necessary facts that led to that arrangement, in paragraph 14 he averred:

"The said agreement is binding on the plaintiff and his mother. It is a family arrangement and a *bona fide* settlement of disputes, entered into in the best interests of the minor plaintiff and his mother. The plaintiff's mother as guardian of the plaintiff and with the advice of the family well-wishers entered into it. Such an arrangement and settlement avoids prolonged and expensive litigation. That settlement and arrangement is binding on the plaintiff and his mother."

In the plaint the plaintiff completely ignored the said arrangement. On the pleadings the following two issues, among others, were framed:

Issue 3.—Whether the agreement and the family arrangement with the father of the plaintiff set up by the 1st defendant is true, valid and binding on the plaintiff.

Issue 4.—Whether the family arrangement set up by the 1st defendant with the mother of the plaintiff after his father's death is true, valid and binding on plaintiff.

On Issue 3, the learned Subordinate Judge held that the family arrangement entered into between Venkatramaiah and Narasimha was true and valid; and on Issue 4, *i.e.*, in regard to the family arrangement alleged to have been entered into after the death of Venkatramaiah, he held against defendants 1 to 4. On appeal, the High Court accepted the finding of the learned Subordinate Judge on Issue 3, *i.e.*, the factum and validity of the family arrangement entered into between Venkatramaiah and Narasimha. No argument was raised in the High Court by the 1st defendant to support the family arrangement under Issue 4.

It is, therefore, not correct to say that the Courts found a family arrangement different from that pleaded by the 1st defendant. Out of the two alternative family arrangements pleaded, they accepted the first, *i.e.*, that entered into between Venkatramaiah and Narasimha under Exhibit B-1.

The next question is whether Exhibit B-1 is valid as a family arrangement. Before we advert to the circumstances under which the arrangement embodied in Exhibit B-1 came to be brought about, we shall briefly notice the law of the family arrangements.

A brief summary of the nature of family arrangements and the conditions for their validity is found in Halsbury's Laws of England, 3rd Edition, Volume 17, at pages 215-216 :

"A family arrangement is an agreement between members of the same family, intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour.

The agreement may be implied from a long course of dealing, but it is more usual to embody or to effectuate the agreement in a deed to which the term 'family arrangement' is applied."

The principles the Courts should bear in mind in appreciating the scope of such family arrangement are stated thus :

"Family arrangements are governed by principles which are not applicable to dealings between strangers. The Court, when deciding the rights of parties under family arrangements or claims to upset such arrangements, considers what in the broadest view of the matter is most for the interest of families, and has regard to considerations which, in dealing with transactions between persons not members of the same family, would not be taken into account. Matters which would be fatal to the validity of similar transactions between strangers are not objections to the binding effect of family arrangements."

This passage indicates that even in England Courts are averse to disturb family arrangements but would try to sustain them on broadest considerations of the family peace and security. This concept of a "family arrangement" has been accepted by Indian Courts but has been adapted to suit the family set up of this country which is different in many respects from that obtaining in England. As in England so in India, Courts have made every attempt to sustain a family arrangement rather

than to avoid it, having regard to the broadest considerations of family peace and security.

With this background let us look at some of the decisions cited at the Bar.

In *Ram Nirunjun Singh v. Prayag Singh*¹, an agreement entered into between two brothers to partition the family property in certain shares was sought to be questioned on the ground that one of the parties had taken undue advantage of the youth and inexperience of the other. In that context, Mitter, J., quoted with approval a passage from Kerr on Fraud. The learned Judge observed :

"But that the Courts go still further in favour of upholding compromises by which family disputes are settled, appears from the following passage in the same treatise (Kerr on Fraud), page 364 :

'The principles which apply to the case of ordinary compromise between strangers, do not equally apply to the case of compromises in the nature of family arrangements. Family arrangements are governed by a special equity peculiar to themselves, and will be enforced if honestly made, although they have not been meant as a compromise, but have proceeded from an error of all parties, originating in mistake or ignorance of fact as to what their rights actually are, or of the points on which their rights actually depend'."

It will be seen from the said passage that a family arrangement resolves family disputes, and that even disputes based upon ignorance of parties as to their rights may afford a sufficient ground to sustain it.

In *Basantakumar Basu v. Ramshankar Ray*², a Division Bench of the Calcutta High Court, after considering the relevant decisions, observed :

"On reading these decisions with care, it seems to us that, if there is one principle that follows from all of them unmistakably, it is this that the arrangement must be one concluded with the object of settling *bona fide* a dispute arising out of conflicting claims to property, which was either existing at the time or was likely to arise in future. *Bona fides* is the essence of its validity, and from this it follows that there must be either a dispute or at least an apprehension of a dispute, a situation or context, which is avoided by a policy of giving and taking; or else, all transfers or surrenders will pass under the cloak of a family arrangement."

These observations do not appear to contain the full statement of the law on the subject.

In *Thakur Umrao Singh v. Thakur Lakhman Singh*³, the facts were: One Kalka Bakhsh Singh had three sons. One of the sons died before the father leaving 2 sons. In 1884, after some quarrels, Kalka Bakhsh Singh executed a document through the intervention of mediators providing how the properties were to be divided between the sons. The Judicial Committee held that it was a family arrangement arrived at by the mediation or arbitration of two gentlemen, who were old friends of the family, and interested in maintaining its honour, and that it was plainly intended to be operative immediately, and to be final and irrevocable, though it failed as it was not registered under the Registration Act. If conflicting legal claims were a necessary ingredient for a family arrangement, there were none in that case, for the property was already declared to be a joint family property and the arrangement was entered into only to have peace in the family and to maintain its honour.

The decision in *Mathukumalli Ramiyaya v. Uppalapati Lakshmayya*⁴ was given on the following facts: One Ramachandrudu died leaving his mother, Bengaramma, and widow, Achamma. In 1859 there was an arrangement between them whereunder the properties of Ramachandrudu were divided between them. On 17th March, 1866, Bengaramma conveyed the properties she got under the said arrangement to her daughter's son Subbaramayya. Subsequently disputes arose between Achamma and Subbaramayya, and, as a result, a settlement was effected between them by mediators, under which Achamma got absolute title to a one-third share of the properties given by Bengaramma to Subbaramayya and Subbaramayya took two-thirds share. After the death of Bengaramma and Achamma, the nearest reversioner to the estate of Ramachandrudu filed a suit for setting aside the alienations made by the said two widows. The arrangement of 1867 was sought to be supported on the ground that it was a *bona fide* settlement of family disputes in respect of Ramachandrudu's estate between his widow and Subbaramayya, which in law would bind the reversioner though he was not a party to it. That contention was

1. (1881) I.L.R. 8 Cal. 138, 142.
2. (1931) I.L.R. 49 Cal. 859, 884, 885.
3. (1911) L.R. 38 I.A. 104 : 21 M.L.J. 637.

4. (1942) 2 M.L.J. 249 : L.R. 69 I.A. 110 :
I.L.R. (1943) Mad. 1 : A.I.R. 1942 P.C. 54.

negatived by the Judicial Committee on the ground that Subbaramayya had no competing title of his own in respect of the property in dispute and, therefore, there could be no basis for a valid family settlement between the parties which would bind the reversioner.

Relying upon this judgment it is contended that a competing title is a necessary condition for the validity of a family arrangement. But it will be noticed that the widows, who had only a woman's interest in the property, divided the property between themselves; they could not enlarge their interest in the estate. A widow could enter into a *bona fide* arrangement in regard to the estate only to preserve it against a conflicting claim against the estate.

This Court in *Sahu Madho Das v. Pandit Mukand Ram*¹, defined the scope of a family arrangement and its ingredients. That appeal arose out of a suit filed by a reversioner for the recovery of the properties alienated from persons claiming under the widow, after the succession opened. The defendants relied upon an arrangement between the widow and her daughters' grandsons whereunder the widow gave certain properties to them absolutely. In dealing with the question whether such an arrangement would amount to a valid family arrangement. Bose, J., speaking for the Court, observed:

"It is well settled that a compromise or family arrangement is based on the assumption that there is an antecedent title of some sort in the parties and the agreement acknowledges and defines what that title is, each party relinquishing all claims to property other than that falling to his share and recognising the right of the others, as they had previously asserted it, to the portions allotted to them respectively. But, in our opinion, the principle can be carried further and so strongly do the Courts lean in favour of family arrangements that bring about harmony in a family and do justice to its various members and avoid, in anticipation, future disputes which might ruin them all, that we have no hesitation in taking the next step (fraud apart) and upholding an arrangement under which one set of members abandons all claims to all title and interest in all the properties in dispute and acknowledges that the sole and absolute title to all the properties resides in only one of their number (provided he or she had claimed the whole and made such an assertion of title) and are content to take such properties as are assigned to their shares as gift pure and simple from him or her, or as a conveyance for consideration when consideration is present."

These observations show how strongly Courts lean in favour of a family arrangement that brings about harmony in the family. The decisions cited at the Bar are only illustrations of the passage quoted from Halsbury's Laws of England in its application to the peculiar circumstances of our country.

Briefly stated, though conflict of legal claims *in praesenti* or *in future* is generally a condition for the validity of a family arrangement, it is not necessarily so. Even *bona fide* disputes, present or possible, which may not involve legal claims will suffice. Members of a joint Hindu family may, to maintain peace or to bring about harmony in the family, enter into such a family arrangement. If such an arrangement is entered into *bona fide* and the terms thereof are fair in the circumstances of a particular case, Courts will more readily give assent to such an arrangement than to avoid it.

With this background let us look at the facts found in the present case. It is true that both the parties took extreme positions in the pleadings as well as in the evidence. It is equally true that the parties did not follow a consistent course during the proceedings, but both the Courts, on the basis of the evidence, found certain facts and circumstances under which Exhibit B-1 was brought into existence. Having found those facts, they ascertained the real character of the instrument. Now the facts found are these: The properties were not ancestral properties but were acquired by Peda Venkaiah and therefore were his self-acquisitions. Narasimha was an able man, whereas Venkatramaiah was just an ordinary unsophisticated agriculturist. Narasimha was helping his father during the latter's lifetime. The father, therefore, told the brothers that a larger share should be given to Narasimha, the extent of the share to be settled by their mother. After the death of the father, though Venkatramaiah was the *de jure* manager, the entire manage-

¹. (1955) S.C.J. 417: (1955) 2 M.L.J. 1955 S.C. 481.
(S.C.) 1: (1955) 2 S.C.R. 22, 42-43: A.I.R.

ment of the estate was entrusted to Narasimha on a promise that his father's word would be respected. After the father's death, Narasimha was not only managing the properties, but also was in management of the money-lending business and the business at Eluru. A large portion of the family properties stood in the name of Narasimha. In 1931 Narasimha wanted to separate himself from the family and asked Venkatramaiah to specify the properties that could be given to him; but Venkatramaiah requested Narasimha to continue to live as before and represented that he would be given three-fifths share in the properties at the time of partition. Subsequently, when Narasimha again insisted upon getting away from the joint family, Venkatramaiah, presumably because Narasimha was indispensable for the proper management of the large family properties and the business and also because a large extent of the properties stood in the name of Narasimha, with the advice of Mr. Chakradhara Rao, a leading lawyer of Eluru, entered into an arrangement with the 1st defendant which was embodied in Exhibit B-1, which we have already extracted at the beginning. Exhibit B-1 records the directions given by the father, the request made by Venkatramaiah to Narasimha asking him to continue the management, the intention of Narasimha to separate himself from the joint family in 1931, the request made by Venkatramaiah to Narasimha to continue to manage the family properties for at least 6 more years and his promise to Narasimha to give him at the end of 6 years three-fifths share in the properties. It then proceeded to state that out of the family properties which belonged to them at that time and which might be acquired thereafter Venkatramaiah should take 2 shares and Narasimha should take 3 shares. Mr. Chakradhara Rao speaks to this document and the representations made to him by the two brothers on the basis of which the recitals were made in the document.

It is therefore clear that Narasimha contributed to the prosperity of the family. Their father, who acquired the properties before his death, gave a direction that Narasimha should be given a larger share in the property. Narasimha, though a junior member of the family, on the promise given by the elder brother managed the properties sincerely and improved them. He was demanding partition and was asking his brother to give him a larger extent of property as directed by their father. There was also a possibility of Narasimha claiming the properties standing in his name as his own. The elder brother, Venkatramaiah, in the interests of harmony among the members of the family and for its benefit accepted the directions given by their father and on the advice of the mother agreed to give Narasimha three shares in the properties and to take 2 shares for himself therein. All the ingredients of a family arrangement as found in decided cases are satisfied in the present case. We, therefore, hold, agreeing with the lower Courts, that this was a family arrangement binding on the members of the family.

The next question turns upon the validity of Exhibits B-1. Both the Courts held that Exhibit B-1 did not require registration. Learned Counsel for the appellant contended that though in law Narasimha was entitled only to $\frac{1}{2}$ share, the document enlarged his share to $\frac{3}{5}$ and, therefore, it clearly affected immovable property and hence it created a larger interest in the immovable property in favour of Narasimha within the meaning of section 17 (1) (b) of the Registration Act.

The operative part of Exhibit B-1 reads thus :

"Therefore out of our family property, i.e., property which belongs to us at present and the property which we may acquire in future, the 1st party of us and his representatives shall take two shares while the 2nd party of us and his representatives shall take three shares. We both parties, having agreed that whenever any one of us or any one of our representatives desires at any time that the family properties should be partitioned according to the above mentioned shares and that till such time our family shall continue to be joint subject to the terms stipulated herein entered into this agreement."

It is common case that this document did not bring about a division by metes and bounds between the parties. It did not also affect the interests of the parties in immovable properties *in praesenti*. What in effect it said was that the parties would continue to be members of the joint Hindu family and that Narasimha would manage the family properties as before, and that when they effected a partition in future Venkatramaiah would get 2 shares and Narasimha would get 3 shares in the properties then in existence or acquired thereafter. There was neither a division in

status nor a division by metes and bounds in 1939. Its terms relating to shares would come into effect only in the future if and when division took place. If so understood, the document did not create any interest in immovable properties *in praesenti* in favour of the parties mentioned therein. If so, it follows that the document was not hit by section 17 of the Indian Registration Act.

The principle underlying section 17 of the Registration Act is well settled. The decisions cited at the Bar are only application of the said principle to the facts of each case. The decision of the Judicial Committee in *Thakur Umrao Singh v. Thakur Lachhman Singh*¹, relates to an instrument of 1884 which was intended to effect partition immediately and, therefore, it was held that it was void as regards immovable property. The decision in *Rajangam Ayyar v. Rajangam Ayyar*², turned upon the terms of Exhibit AY whereunder two brothers severed themselves in status and agreed to have a document executed for effectuating the partition. Dealing with the document, the Judicial Committee held that the document did not by itself create, assign, limit or extinguish any right or interest in immovable property but only created a right to obtain another document. The decision in *Sir Hari Sankar Paul v. Kedar Nath Saha*³, was relied upon by analogy. There an agreement in writing which contained all the essentials of the transaction of a mortgage was held to be a document hit by section 17 (1) (b) of the Registration Act. It was held to be a document containing the bargain made between the parties and constituting a transfer of the property by way of mortgage and, therefore, it required registration. Further citation is unnecessary.

For the foregoing reasons, we hold that the document, Exhibit B-1 does not require registration.

In this view, no other question arises for consideration. The appeal fails and is dismissed with costs.

K.G.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—MR. P.B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYATULLAH, J. C. SHAH AND S. M. SIKRI, JJ.

State of Madras

.. *Appellant**

v.

A.R. Srinivasan

.. *Respondent.*

Constitution of India (1950), Article 311—Disciplinary proceedings—Reference to Tribunal—Findings against delinquent officer—Compulsory retirement recommended—Notice to show cause—Explanation submitted—Consultation by Government with State Public Service Commission—Order for retirement proper—G.O. No. 902 dated 28th May, 1938, commented upon.

The Government of Madras provisionally accepted the findings of the Tribunal for disciplinary proceedings against the respondent herein and its recommendation that he should be compulsorily 'retired from service'. Notice to show cause was given to the officer and on receipt of his explanation thereto the matter was referred to the State Public Service Commission for advice. The Commission, in its advice, stated 'it is generally in agreement with the findings of the Tribunal and it observed that the respondent's explanation is unconvincing. It also stated "the prosecution evidence as a whole leaves in one's mind a strong suspicion of corrupt practice on the part of the accused officer although some of the individual instances may not stand the test of legal proof as in a criminal case" and added "according to the principles laid down in G.O. 902 (public services) dated 28th May, 1938, dismissal or removal would be justified in the case. Commission agrees, in all the circumstances of the case it is enough to impose the penalty. The Commission advises accordingly."

1. (1911) L.R. 38 I.A. 104 : 21 M.L.J. 637.

2. (1922) L.R. 50 I.A. 34 : I.L.R. 46 Mad.

373 : 44 M.L.J. 745 : A.I.R. 1922 P.C. 266.

*C.A. No. 1113 of 1964.

3. (1939) L.R. 66 I.A. 184 : (1939) 2 M.L.J. 522 : A.I.R. 1939 P.C. 167.

The Government accordingly ordered the compulsory retirement of the respondent.

The High Court of Madras on a Writ Petition under Article 226 of the Constitution came to the conclusion that the impugned order aforesaid was really based on a mere suspicion and as such invalid; therefore the order was set aside. The appeal to the Division Bench was dismissed. Hence this appeal.

Held, the words used by the Public Service Commission in its recommendation are somewhat ambiguous so that it may lead to the inference that there was a strong suspicion and nothing more; strong support for that view may be found by the reference to G.O. 902. That being so it cannot be held that the High Court erred in its conclusion. That however is not the end of the matter.

On a fair construction of the order for compulsory retirement passed by the Government (appellant) it clearly means that the Government agreed with the view of the Commission that compulsory retirement of the respondent would meet the ends of justice—would be enough penalty—and not as the High Court appears to have assumed that the appellant agreed with the Commission's opinion that the case against the respondent was no more than strong suspicion. The Government accepted the findings of the Tribunal that three charges against respondent were proved and then sought the advice of the Commission.

It is not necessary for the appellant to state reasons why they accepted the findings of the Tribunal; it could not also be claimed as a matter of law that the Government cannot impose the penalty without giving such reasons.

In G.O. No. 902 dated 28th May, 1908, it appears to be assumed that a public servant can be punished even without proof of any corrupt practice, if the cumulative evidence that he was suspected in a number of instances to be corrupt or is generally believed to be a corrupt officer is available against him. The view thus expressed is open to serious objection.

Appeal by Special Leave from the Judgment and Order dated the 1st November, 1962, of the Madras High Court in Writ Appeal No. 78 of 1961.

Bishni Narain, Senior Advocate (*P. P. Juneja* and *A. V. Rangam*, Advocates, with him), for Appellant.

M. G. Setalvad, Senior Advocate (*K. K. Venugopal*, Advocate and *J. B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him), for Respondent.

The Judgment of the Court was delivered by

Gajendragadkar, C.J.—The respondent, *A.R. Srinivasan*, entered Government service in the State of Madras and was first appointed as Supervisor in the Public Works Department. After about 21 years of service, he rose to the rank of an Executive Engineer and was appointed as the Project Engineer in charge of the Manimuthar Project in the Tirunelveli district. He was holding this post from 1st August, 1951 to the 30th September, 1954. It appears that certain complaints of corruption were received against the respondent by the appellant, the State of Madras, and were investigated by the C.I.D. As a result of these investigations, a reference was made to the Tribunal for Disciplinary Proceedings, Madras, which framed two charges against the respondent on the 3rd September, 1954. On the 30th September, 1964, the respondent was transferred to Madras. On a further reference by the appellant, the said Tribunal framed three additional charges against the respondent on the 31st December, 1954. All these charges were in respect of acts of corruption alleged to have been committed by the respondent.

After the said two sets of charges were communicated to the respondent, the Tribunal held an enquiry. At this enquiry, 18 witnesses were examined for the appellant and 83 Exhibits were filed in support of the charges. As a result of the enquiry, the Tribunal found that out of the five charges, the first and the last charges were not proved, although there was some suspicion of guilty in respect of a gold wrist watch chain mentioned in charge No. 1. The Tribunal also found that the remaining three charges has been proved against the respondent. Having recorded these findings, the Tribunal recommended that the respondent should be compulsorily retired from service.

On receipt of the report made by the Tribunal (Item No. 7), the appellant provisionally accepted its findings and came to the conclusion that the respondent

should be compulsorily retired from service. Accordingly, a notice dated 13th June, 1956 (Item No. 8) was served on the respondent. By this notice, the respondent was told that the Government had provisionally accepted the findings of the Tribunal and had arrived at the provisional conclusion that he should be compulsorily retired from service. The respondent was then called upon to show cause, within one month of the receipt of the memorandum, why he should not be compulsorily retired from service. This notice intimated to the respondent that he may peruse the connected records in the Office of the Tribunal and take notes or copies thereof to enable him to submit his explanation. He was warned that the period of one month indicated in the notice for submitting his explanation would not be extended. Accordingly, the respondent submitted an elaborate explanation in support of his case that he was completely innocent of all the charges framed against him.

Thereafter, the appellant sent the matter to the Madras Public Service Commission for its advice. On the 2nd April, 1957, the Commission sent its advice to the appellant (Item No. 9). In this communication, the Commission stated that "it is generally in agreement with the findings of the Tribunal". It observed that the respondent's reply to the show cause notice was unconvincing. "The prosecution evidence, as a whole", said this communication, "leaves in one's mind a strong suspicion of corrupt practices on the part of the accused officer although some of the individual instances may not stand the test of strict legal proof as in a criminal case." The Commission also added that :

"according to the principles laid down in G.O. No. 902, (Public Services), dated the 28th May, 1938, dismissal or removal would be justified in this case. The proposed penalty of compulsory retirement errs on the side of leniency, but it serves the purpose (*viz.*, that the accused officer should no longer be retained in service) well enough. The Commission agrees that in all the circumstances of the case, it is enough to impose that penalty. The Commission advises accordingly."

On receipt of this advice, the appellant ordered that the respondent should be compulsorily retired from service with effect from the afternoon of the 23rd March, 1957, on which date he was placed under suspension. This order was passed on the 14th November, 1957 (Item No. 10).

It appears that while these proceedings were pending before the appellant, certain other complaints were received against the respondent, and they were ordered to be investigated. The order by which the respondent was compulsorily retired from service by the appellant sets out in brief the history of the proceedings taken against the respondent, the nature of the advice received by the appellant from the Public Service Commission, and concludes in paragraph 4 that the "the Government have carefully considered the explanation submitted by the accused officer in consultation with the Madras Public Service Commission." This paragraph then summarises the advice given by the Madras Public Service Commission. The last two sentences in this paragraph are relevant. "The Commission", says the said paragraph, "has therefore agreed that in the present case, it is enough to impose the penalty of compulsory retirement from service on the delinquent officer. The Government agree with the Madras Public Service Commission." Paragraph 5 refers to the further complaints received against the respondent and directs that the same should be investigated. The operative portion of this paragraph says that the Government have decided that the accused officer should be retired compulsorily on the basis of the charges already proved before the Tribunal for Disciplinary Proceedings and that if it is later found necessary to impose further punishment on the basis of the present enquiry into the further charges against the officer, then the question of reducing the pension due to the officer for unsatisfactory work may be considered by Government.

Aggrieved by this order, the respondent moved the Governor of Madras by way of appeal on the 23rd January, 1958. The Governor was pleased to dismiss the respondent's appeal on the 25th July, 1958, with the observation that the appeal submitted by the respondent contains no new facts and as such does not afford fresh grounds for reconsideration of the case now (Item No. 13). This order also points

out that the Governor had gone through the relevant papers on the subject and had observed that the three charges held to be proved against the respondent by the Tribunal were sufficiently grave calling for the imposition of the penalty of compulsory retirement from service under the Government. That is how the respondent's appeal before the Governor came to be dismissed.

The respondent then moved the Madras High Court under Article 226 of the Constitution challenging the validity of the order passed by the appellant compulsorily retiring him from service. The learned Judge who heard this writ petition, came to the conclusion that the impugned order by which the respondent was compulsorily retired from service, was really based on mere suspicion and as such, was invalid. That is why writ petition filed by the respondent was allowed and the impugned order was set aside. The appeal preferred by the appellant against this decision was dismissed by the Division Bench of the said High Court on 1st November, 1962; it is this appellate decision which has brought the appellant before this Court by Special Leave.

Mr. Bishan Narain for the appellant contends that the High Court was in error in holding that the respondent had been compulsorily retired by the appellant merely on suspicion. The finding made by the High Court on this point, says Mr. Bishan Narain, is plainly based upon a misconstruction of the impugned order. In our opinion, this contention is well-founded and must be upheld.

It is common ground that the enquiry held against the respondent by the Tribunal was fairly conducted and principles of natural justice were fully complied with. It is also common ground that in its report, the Tribunal has examined the evidence both oral and documentary, and has made clear findings in respect of the five charges framed against the respondent. According to the Tribunal, the first and the last charges were not proved, whereas the remaining three had been proved. This position is not in dispute. The High Court has taken the view that when the Public Service Commission was consulted, it expressed its concurrence with the punishment which the appellant proposed to impose upon the respondent on the ground that even if there was nothing more than a strong suspicion of corrupt practices against the respondent, his compulsory retirement would be justified. It must be conceded that the words used by the Public Service Commission in its communication to the Government are somewhat ambiguous. In the first part of the communication, the Commission has expressed its general agreement with the findings of the Tribunal. If that is read by itself, it would show that the Commission accepted the finding of the Tribunal that the respondent was guilty of three charges. Having made this observation, however, the Commission has further referred to the fact that the prosecution evidence as a whole, leaves in one's mind a strong suspicion of corrupt practices on the part of the accused officer; and this would suggest that the Commission was proceeding on the basis that in the present case, there was a strong suspicion against the respondent and nothing more. This reading in partly supported by the fact that the Commission refers to a G.O. No. 902, Public (Services) dated the 28th May, 1938, which seems to indicate that even though guilt is not established against a public servant by proof as in a criminal case, the fact that an officers reputation is notoriously bad affords just ground for the Government to refuse to continue to be represented or served by such an officer in any department. Inasmuch as the Commission has referred to this G.O., it may well be said that the Commission was prepared to advise the appellant to compulsorily retire the respondent from service, though the case against the respondent may be based merely on strong suspicion. That being so, it may not be possible to hold that the High Court was in error in coming to the conclusion that the advice of the Public Service Commission was substantially based on the G.O. in question.

That, however, is not the end of the matter. What the High Court had to consider and what we must decide in the present case is whether the appellant ultimately decided to compulsorily retire the respondent merely on suspicion; and the decision of this question must depend upon a fair construction of the order passed

by the appellant on the 14th November, 1957. We have already referred to the relevant portions of this order. In paragraph 4 of this order, the appellant has expressed its agreement with the Madras Public Service Commission ; but that, in the context, clearly means that the appellant agreed with the view of the Public Service Commission that compulsory retirement of the respondent would meet the ends of justice in the present case. It does not mean, as the High Court seems to have assumed, that the appellant agreed with the Commission's view that the case against the respondent was no more than one of strong suspicion. One has merely to read the whole of paragraph 4 to be satisfied that all that the appellant states towards the close of the said paragraph was that the appellant thought that the Commission was right in taking the view that compulsory retirement of the respondent would be enough penalty in the present case.

This construction of the last portion of paragraph 4 is clearly supported by the definite order made in paragraph 5 where the appellant has expressly stated that the Government have decided that the officer should be retired compulsorily on the basis of the charges already proved before the Tribunal. It is impossible to see how this finding, which is clear and categorical, can be ignored in considering the question as to whether the appellant acted against the respondent merely on suspicion. The whole order is elaborately drawn ; it sets out the history of the proceedings ; the findings of the Tribunal, the advice of the Madras Public Service Commission, and the conclusion of the appellant. The conclusion of the appellant is clear ; the appellant took the view that three charges had been proved before the Tribunal, and it is on proof of those charges that the punishment of compulsory retirement was imposed on the respondent.

When the matter reached the Governor in the form of an appeal presented before him by the respondent, we find that the Governor rejected the respondent's appeal on the ground that three charges had been held proved against the respondent by the Tribunal and that the respondent had produced no new facts and had adduced no fresh grounds for reconsideration of his case. Therefore, it seems to us that the High Court was in error in coming to the conclusion that the impugned order passed against the respondent was based on mere suspicion. The Tribunal had made definite findings against the respondent in respect of three charges, and the appellant accepted those findings before it imposed the penalty of compulsory retirement on the respondent.

Mr. Setalvad for the respondent attempted to argue that the impugned order gives no reasons why the appellant accepted the findings of the Tribunal. Disciplinary proceedings taken against the respondent, says Mr. Setalvad, are in the nature of quasi-judicial proceedings and when the appellant passed the impugned order against the respondent, it was acting in a quasi-judicial character. That being so, the appellant should have indicated some reasons as to why it accepted the findings of the Tribunal ; and since no reasons are given the order should be struck down on that ground alone.

We are not prepared to accept this argument. In dealing with the question as to whether it is obligatory on the State Government to give reasons in support of the order imposing a penalty on the delinquent officer, we cannot overlook the fact that the disciplinary proceedings against such a delinquent officer begin with an enquiry conducted by an officer appointed in that behalf. That enquiry is followed by a report and the Public Service Commission is consulted where necessary. Having regard to the material which is thus made available to the State Government and which is made available to the delinquent officer also, it seems to us somewhat unreasonable to suggest that the State Government must record its reasons why it accepts the findings of the Tribunal. It is conceivable that if the State Government does not accept the findings of the Tribunal which may be in favour of the delinquent officer and proposes to impose a penalty on the delinquent officer, it should give reasons why it differs from the conclusions of the Tribunal, though even in such a case, it is not necessary that the reasons should be detailed

or elaborate. But where the State Government agrees with the findings of the Tribunal which are against the delinquent officer, we do not think as a matter of law, it could be said that the State Government cannot impose the penalty against the delinquent officer in accordance with the findings of the Tribunal unless it gives reasons to show why the said findings were accepted by it. The proceedings are, no doubt, quasi-judicial; but having regard to the manner in which these enquiries are conducted, we do not think an obligation can be imposed on the State Government to record reasons in every case.

We may incidentally point out that in G.O. No. 902, Public (Services), dated the 28th May, 1938, to which the Public Service Commission has referred in its communication addressed to the appellant it appears to be assumed that a public servant can be punished even without proof of any corrupt practice if the cumulative evidence that he was suspected in a number of instances to be corrupt or is generally believed to be a corrupt officer, is available against him. In our opinion, the view thus expressed by the Government Order is open to serious objection. It may be that in disciplinary proceedings taken against public servants, the technicalities of criminal law cannot be invoked, and the strict mode of proof prescribed by the Evidence Act may not be applied with equal rigour; but even in disciplinary proceedings, the charge framed against the public servant must be held to be proved before any punishment can be imposed on him.

The result is, the appeal is allowed, the order passed by the Division Bench of the High Court is set aside and the writ petition filed by the respondent is dismissed. There would be no order as to costs.

K.G.S.

*Appeal allowed ;
Writ Petition dismissed.*

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CUMULATIVE TABLE OF CASES REPORTED.

PARTS 1-3

	PAGES.
Abdul Karim Khan v. Municipal Committee	299
Ananda Nanibiar v. Chief Secy., Govt. of Madras	272
Abdul Wahed Khan v. Bhawani ..	79
I.T. Alaula v. M. Nagjibhai ..	41
All India R.B. Employees' Assn. v. R.B. of India..	338
Associated Clothiers, Ltd. v. C.I.T., Calcutta ..	164
Bahrein Petroleum Co., Ltd. v. P.J. Pappu ..	49
Badriprasad v. State of M.P. ..	311
C.I.T., Bombay City-I v. Godavari Sugar Mills, Ltd	329
C.I.T. v. Girdhardas & Co. ..	129
C.I.T., Calcutta v. Bidhu Bhushan Sarkar ..	245
C.I.T., Gujarat v. Kantilal Nathuchand Sami ..	148
C.I.T., Madras v. Prithivi Insurance Co., Ltd. ..	400
C.I.T., Mysore v. Canara Bank Ltd. ..	153
C.I.T., U.P. v. Nainital Bank, Ltd. ..	76
C.I.T., W.B., Calcutta v. Juggilal Kamalapat ..	177
Calcutta Tramways Co., Ltd. v. Corpn. of Calcutta ..	308
Chandulal Harjiwandas v. C.I.T., Gujarat ..	292
Commr. of W.T. v. Ramaraju Surgical Cotton Mills ..	123
Gumbum Roadways (P.), Ltd. v. Somu Transport (P.), Ltd.	31
Dr. S. Dutt v. State of U.P. ..	92
M/s. O. RM. M. SP. SV. Firm v. C.I.T., Madras ..	251
Dr. Guranditta Mal Kapur v. Mahant Ram Saran ..	334
Gulam Yasin Khan v. S.Y. Walaskar ..	1
Gupta & Sons v. Damodhar Valley Corporation ..	225
Hukumchand Mills, Ltd. v. C.I.T., Bombay ..	144
M/s. Jalan Trading Co. v. Mill Mazdoor Sabha ..	189
Jaora Sugar Mills (P.), Ltd. v. State of M.P. ..	98
Jawaharmal v. State of Rajasthan ..	234
Joint Family of Udayan Chinubhai v. C.I.T., Gujarat ..	323
M/s. Jugal Kishore Baldeo Sahai v. C.I.T., U.P., Lucknow ..	169
Kamble v. Sholapur Borough Municipality ..	117
Katra Education Society v. State of U.P. ..	5
Martin Burn, Ltd. v. Corpn. of Calcutta ..	387
Manikayala Rao v. Narasimhaswami ..	110
Maqbool Alam Khan v. Mst. Khodaija ..	63
Mohammad Bagban v. State of Gujarat ..	82
Millowners' Association v. Textile Labour Association ..	360
K. V. Narayana & Sons v. First Addl. I.T.O., Rajahmundry ..	157
Narayanappa v. C.I.T., Bangalore ..	161
S. S. Nirmal Chand v. Union of India ..	267
Nichhalbhai Vallabhai v. Jaswantlal Zinabhai ..	106
Y.S. Panchaksharamma v. Y. Chinnabbayi ..	15
Paramananda Mahapatra v. Commr. of H.R.E. ..	397
M. M. Parikh v. Navanagar Transport & Industries Ltd. ..	285
Pema Chibar v. Union of India ..	35
Prabhu v. Ramdeo ..	60
Prohudas Morarjee Rajkotia v. Union of India ..	52
Principal, Patna College, Patna v. K. S. Raman..	260
Ram Chandra Aggarwal v. State of U. P. ..	139
Ram Kumar Agarwal v. C.I.T., Calcutta ..	296
Rajalinga Raja v. State of Madras ..	320

CUMULATIVE INDEX OF REPORTS.

PARTS 1-3.

PAGES.

- Act of State—Portuguese territories acquired by India on 20th December, 1961—Resident who held import licences from Portuguese Government—If entitled to enforce right to import under such licences against Union of India—Refusal to recognise the licences—Petition under 32 of Constitution of India (1950)—If sustainable—35
- Bhopal State Land Revenue Act (IV of 1932), section 200 (1)—Scope—Order of Tahsildar under section 71 for ejection of *Shikmi* at the instance of *Khatedar*—Suit in civil Court by the person ordered to be ejected claiming to be *Khatedar*—If barred—Sections, 89, 92, 93 and 95—Effect—79
- Bombay Industrial Relations Act (XI of 1947), sections 42 and 73—Scope of—Award subsisting—No notice of change given by either party—Reference to Industrial Court by the Government—Maintainability—Consumers price Index number—Changes made by Government—Employer paying under the old scheme—Industrial dispute—360
- Bombay Tenancy and Agricultural Lands Act (LXVII of 1948), sections 31, 88 and 89 (2)—Scope and effect—Lessee from local authority—Interests acquired under Bombay Tenancy Act (XXIX of 1939)—If saved—Effect of section 88—117
- Bombay Tenancy and Agricultural Lands Act (LXVII of 1948) (as amended by Act XXXIII of 1952) and XIII of 1956), sections 43-C, proviso 70, 85 and 85-A—Rights conferred by the unamended Act—If extinguished by the amending Acts of 1952 and 1955 (Acts XXXIII of 1952 and XIII of 1956)—Scope and effect of the proviso to section 43-C—Jurisdiction of civil Court to grant possession of land held by a tenant—Application of section 7 of the Bombay General Clauses Act (I of 1904)—41
- Calcutta Municipal Act (III of 1923), sections 127, 131, 139 to 142 and 147—“Annual value” of premises let or intended to be let—Determination of—Provision applicable—Appeal to Small Cause Court—Assessment set aside with direction to re-value under section 127 (a)—Appeal to High Court by the Corporation—Order of lower Court maintained, but remanded to Small Cause Court itself to fix value under clause (a) of section 127—Validity of remand order—387
- Calcutta Tramways Act (W.B. Act XXV of 1951), section 5, proviso—Scope—Proper construction—368
- Central Provinces and Berar Municipalities Act (II of 1922), section 15 (1)—Scope—Election of members to Municipal Committee—Disqualification under section 15 (1) form standing for election—When incurred—Mere relationship of a person with an employee of the Municipal Committee—If sufficient to disqualify him—1
- Civil Procedure Code (V of 1908), section 16 (16)—Order 22, rule 4—Suit and decree against some of the legal representatives—How far binding on the others not impleaded—24
- Civil Procedure Code (V of 1908) (V of 1908), sections 14 and 144—Application for restitution under section 144—Applicability of principles of *res judicata*—63
- Civil Procedure Code (V of 1908), section 21—Waiver of objection to territorial jurisdiction—Requirements—Application for stay under section 34 of Arbitration Act X of 1940 and appeal under section 39 against order refusing stay—If amounts to conceding jurisdiction of trial Court—49
- Civil Procedure Code (V of 1908), section 24—Power of transfer—District Judge if can transfer reference by Magistrate to a civil Court under section 146 of the Criminal Procedure Code to another civil Court—Court to which reference is made—If *persona designata*—Proceeding if writ proceeding, to which Civil Procedure Code applies—139
- Civil Procedure Code (V of 1908), section 80 and Order 21, rule 63—Scope and applicability of section 80—Suit under Order 21, rule 63 against Government—Provisions of section 80 if attracted—267
- Civil Procedure Code (V of 1908), Order 6, rule 17—Suit for mere declaration held to be unsustainable under proviso to section 42, Specific Relief Act (I of 1877)—Amendment including prayer for consequential relief—If can be allowed after it is time barred—223
- Civil Procedure Code (V of 1908), Order 6, rule 17—Suit by Hindu coparceners for division of partition alleging that there had been severance in status—Mayukha law requiring consent of father who continued joint with his own father and brothers—Application to amend plaint by deleting words “and have been” and “and were” from phrases “were and have (been)” and “were” and “are” members of a joint Hindu family—Right to grant of—106

Civil Procedure Code (V of 1908), Order 21, rules 35 (2) and 96—Execution sale of shares of some members of a joint Hindu family—Order for delivery of a joint possession with members of joint family and publication of such delivery of possession by beat of drum—Effect—If purchaser gets possession—Suit by auction-purchaser for partition—Limitation—Starting point—Limitation Act (IX of 1908), Articles 144 and 120—Applicability	110
Company—Acquisition of the undertaking by Government—Principles to determine compensation, prescribed by law—Actual cost to company of unused plant, machinery, etc.—Cost less depreciation as 'written-down value' of used machinery—If 'just equivalent'—Judicial security	182
Constitution of India, 1950 (as amended by Fourth Amendment Act, 1965), Article 31 (2)	182
Constitution of India (1950), Article 14—Plea of discrimination—Full particulars must be furnished	52
Constitution of India (1950), Article 14—Plea of discrimination—Full particulars must be given	5
Constitution of India (1950), Articles 77 (2) and 359—Order of President, dated 3rd November, 1962, as amended on 11th November, 1962 and issued under Article 359 (1)—Validity and effect—Petition under Article 32 of the Constitution of India challenging a detention order on ground that rule 30 (1) (b) of the Defence of India Rules (1962) under which the order is made is invalid, or on the ground that the detention order was made <i>malafide</i> —If barred	272
Constitution of India (1950), Articles 79, 85 (1), 86 (1), 100 (1) and 105—Scope	272
Constitution of India (1950), Article 226—Motor Vehicles Act (IV of 1939)—Government Order No. 1298 issued by the Government of Madras relied on by an applicant for stage carriage permit before Regional Transport Authority—Said Government Order struck down by Supreme Court during pendency of further proceedings—Applicant if barred from contending in such proceedings that the Government Order is bad—Writ proceedings against order of the State Transport Appellate Tribunal made in appeal—High Court deciding to remand the case—Remand if should be to original or appellate authority—Parties entitled to be heard in such remand	31
Constitution of India (1950), Article 226—Orders passed by educational authorities under relevant regulations framed by the University—Interference with by High Court in writ petition—Limitations	260
Constitution of India (1950), Article 227—Should be used sparingly	12
Constitution of India (1950), Article 255—Act of State Legislature passed without complying with the provisions of Article 255—If can be validated by subsequent legislation	234
Constitution of India (1950), Article 309, Proviso—Scope—Notification, dated 25th March, 1959 made by Mysore Governor under—Validity	256
Contract Act (IX of 1872), section 148—Iron sheets belonging to defendant supplied to plaintiff under a contract by latter to manufacture drums for the defendant—Later contract cancelled—Suit by plaintiff as bailee for compensation for storage of iron sheets in its godown—Measure of—Notice by plaintiff claiming storage charges at certain rate—No reply from defendant—If amounts to implied undertaking to pay godown rent at that rate	304
Contract Act (IX of 1872), section 196—Sale of cut-trees in forest on behalf of Government—Ratification after goods were destroyed by fire—Validity	311
Defence of India Rules (1962), Rule 30 (1) (b)—If invalid in so far as it permits a Member of Parliament to be detained	272
Evidence Act (I of 1872), section 116—Limitation Act (IX of 1908), section 28 and Article 144—Tenancy from year to year of lands belonging to a Hindu deity granted by its manager—If terminates with the expiry of office of such manager—Tenant if can, during continuance of the tenancy, acquire absolute title or permanent right of occupancy by prescription	17
Gujarat Agricultural Produce Markets Act (XX of 1964)—Validity—If infringes Articles 14, 19 and 31 of the Constitution—Declaration of emergency by the President—Effect on right to enforce the fundamental rights under Article 19	82
Hindu law—Religious endowment—Lease of lands belonging to deity—Tenancy if intended to be permanent—Considerations—Tenant deliberately withholding the Sanad by which the tenancy was created—Presumption	17
Hindu undivided family—Partition between groups of members of family—Whether can be recognised by Income-tax Officer—Partition between G and his wife and sons—Wife and sons forming one group—Share allotted to wife and sons remaining undivided—Order recording partition—Wife and sons whether constitute Hindu undivided family and assessable in that status	323
Imports and Exports (Control) Act (XVIII of 1947)—Imports (Control) Order (1955)—Special Exports Promotion Scheme for Engineering Goods (1963), Para 5.4—Grant of import licences under—Value for which it could be granted—Determination—Powers of licensing authority	52

Income-tax Act (XI of 1922)—Capital receipt or revenue receipt—Banking company having branch in Pakistan—Devaluation of Indian Rupee—Amount belonging to head office lying at branch in Pakistan on date of devaluation—"Blocked" and "sterilised" and not utilised in banking operation—Remittance to India after grant of permission—Profit realised by bank on account of fluctuation in exchange rate—Nature of receipt	153
Income-tax Act (XI of 1922), section 2 (6-A), clause (c) (as amended by Finance Act, 1956)—Dividend—Company in liquidation—Accumulated profits existing on date of liquidation—Distribution by liquidator—Amount over and above accumulated surplus—Subsequent distributions—If deemed dividend—Whether and to what extent attributable to accumulated profits	129
Income-tax Act (XI of 1922), section 4 (3) (vii)—Adventure in the nature of trade—Assessee, a firm of sharebrokers—Joint negotiations to purchase controlling interest in a company—Subsequent agreement with rival purchaser to secure and transfer controlling interest—Amount received from rival purchaser on completion of transaction—Whether revenue receipt or non-recurring casual receipt	296
Income-tax Act (XI of 1922), sections 5 (7-A) and 34—Back assessment—Initiation by and pendency of proceedings before two Officers—Order by one "the case is therefore filed"—Scope of the order—Transfer of case—"Case" includes pending proceedings as well as proceedings to be instituted—No specific case pending—Order of transfer—Valid—Words and Phrases—"Filed"—"Case"	245
Income-tax Act (XI of 1922), sections 10 (2) (vi), 10 (5) (b) and 33 (4) and Appellate Tribunal Rules, 1946, rules 12 and 27—Tribunal—Appeal—Powers of remand—Assessee-company registered and carrying on business in former Indian State—Constitution of India—Assessee liable to be assessed as a resident, of Part B State—Computation of written-down value and depreciation—Assessment year 1950-51—Appeal by assessee before the Tribunal—Depreciation actually allowed—Taxation Laws Order and Industrial Tax, Rules of former State allowing depreciation—Applicability raised by Revenue for the first time before the Tribunal—Power of the Tribunal in entertaining plea and remanding matter back to Officer	144
Income-tax Act (XI of 1922), section 10 (2) (vi), second Proviso—Balancing charge—Assessee, a company—Transfer of assets and liability to another company under an agreement—Discharge of liabilities of assessee, cash and shares of the company—Consideration for the transfer—Difference between original cost and written-down value of house property on the date of transfer—Deemed profits—Taxability—Sale, if made in a commercial sense, criterion	164
Income-tax Act (XI of 1922), section 10 (2) (xv)—Business expenditure—Loss in dacoity—Assessee, a bank—Advances on pledge of jewellery—Theft of jewellery in a dacoity—Settlement between assessee and constituents—Excess of market value on jewels over amounts due by constituents—Payment by assessee—Expenditure—Allowable as business expenditure—Settlement, bilateral—Not merely forbearance to enforce claim—Mere forbearance to enforce claim—If an expenditure	67
Income-tax Act (XI of 1922), section 10 (2) (xv)—Business expenditure—Hindu undivided family—Karta—Salary or remuneration paid to Karta to manage family business, under a valid agreement—Existence of minor coparceners—Agreement in the interests of the family and for the benefit of minor—Amount allowable as business expenditure	169
Income-tax Act (XI of 1922), section 10 (2) (xv)—Business expenditure—Legal expenses—Restrictions in the carrying on of a business—Imposed by legislative or executive act—Legal proceedings to quash act—Expenses—Allowable business expenditure—Expenditure incurred need not be directly to earn income—Persistence in proceedings by filing successive appeals or ultimate failure—Not relevant—Assessee, mills carrying on business—Cotton spinning and weaving—Delivery of yarn, manufactured, to weavers outside for weaving into cloth—Cotton Control Order—Assessee prohibited from delivering yarn to such weavers—Legal proceedings and successive appeals to quash the order—Expenses thereof and costs payable to Government—Permissible business expenditure	134
Income-tax Act (XI of 1922), section 10 (2) (xv)—Capital or revenue expenditure—Assessee, a company—Assets of another company in winding up and with largest Government shareholding and two other Government factories taken over under an agreement—Provision for cash consideration for sale—Percentage of profits also to be paid to Government—Payment for an indefinite period related to annual profits and not to any capital value and not as part of the purchase price—Revenue expenditure	70
Income-tax Act (XI of 1922), sections 10, 23 (1), (3), (4), (5) (a), 24 (1) first and second Provisos, 24 (2) and Proviso (c) to section 24 (2)—Loss—Carry-forward and set-off—Registered firm—Speculation loss—Whether apportionable between partners—Firm, whether entitled to carry-forward and set-off	148
Income-tax Act (XI of 1922), section 15 (1)—Exemption—Life insurance—"Children's Deferred Endowment Assurance"—Policy on minor's life taken by father—Premium paid out of minor's taxable income—Rebate, whether admissible in minor's assessment	292

	PAGES.
Income-tax Act (XI of 1922), section 16 (3) (a) (i) and (ii)—Firm—Assessee, his wife and stranger partners—Two minor sons of assessee also admitted to benefits of partnership—Interest on accumulated profits of wife and minor sons—Whether includible in the assessment of the assessee	174
Income-tax Act (XI of 1922), section 23-A—Deemed dividend—Dividend declared at Annual General Meeting—Maximum permitted under law then in force—Subsequent repeal of that law within six months of the meeting—Order of deemed distribution—Invalid	329
Income-tax Act (XI of 1922), section 23-A (after amendment in 1955) and section 34(3)—Undistributed income—Profits of company—Declaration of dividend below statutory percentage—Order imposing additional super-tax under section 23-A—Whether an order of assessment—Bar of limitation under section 34(3)—Whether applies to such an order	285
Income-tax Act (XI of 1922), section 24(2)—Loss—Set-off—Same business—Criterion—Inter-connection, interlacing, interdependence and unity—Closure of one business without affecting the other business—Not a decisive test—Assessee a company carrying on life insurance and general insurance business—Allowed under the memorandum of association—Common administrative organisation and common expenses—Loss in life business against profits in general business—Set-off—Allowable—Same business	400
Income-tax Act (IX of 1922), section 25—Discontinuance—Business charged to tax under the 1918 Act—Exemption—Assessee, firm—Business in India and outside India—Profits of foreign business—Receipt—Taxed under the 1918 Act—Discontinuation of firm—Foreign business and rental income from houses owned by foreign firm—Relief on discontinuance—Allowable—Receipt of income derived from foreign business—Charge under the 1918 Act—Amounts to assessment on foreign business—Business, profession or vocation—Not a unit of assessment—Charge on the owner of the business—Exemption on discontinuance—General—Not restricted to the head "profits and gain of business"—Division into various heads only for computation—Rental income from property owned by foreign firm—Relief on discontinuance—Tenable	251
Income-tax Act (XI of 1922), sections 25-A; 34—Re-assessment—Partition of Hindu undivided family—Order recognising partition—Re-assessment proceedings ignoring such order—Validity—Nature of order recording partition	323
Income-tax Act (XI of 1922), section 26-A—Registration of firm—Some partners, creating trust and becoming trustees—Relinquishment of their rights in the assets of firm in favour of trust—Deed of relinquishment not registered—New firm constituted with the trust (represented by trustees) as a partner—Whether legally constituted and entitled to registration	177
Income-tax Act (XI of 1922), section 34—Back assessment—Income-tax Officer—Jurisdiction—Conditions precedent—Reasonable belief of under-assessment—Reasonable belief on the basis of omission or failure of assessee to file return or to disclose fully and truly material facts—Existence of the belief—Open to challenge in civil Court—Sufficiency of the reasons for the belief—Not justiciable—Reasons for the belief, if have a rational connection and relevant bearing to the formation of the belief—Justiciable—Recording reasons for initiation of back assessment proceedings and obtaining sanction of the Commissioner—Administrative and not quasi-judicial—No duty to communicate reasons to assessee	161
Income-tax Act (XI of 1922), section 34—Re-assessment—Notice—Clause under which notice is issued, whether should be specified—Duty of assessee to disclose material facts—Production of books of accounts or other evidence—Whether sufficient	157
Income-tax Act (XI of 1922), section 66—Reference—High Court—No power to admit additional evidence	164
Industrial Disputes Act (XIV of 1947) (as amended in 1956), sections 2 (k), 2 (s) (iv) and 10 (1-A)—Supervisor when ceases to be a workman under section 2 (s) (iv)—Word "Supervise" and its derivatives—Meaning of—Class II staff of Reserve Bank of India if employed in supervisory capacity—Reference under section 10 (1-A) of dispute in regard to supervisors drawing less than Rs. 500 per month but on scales carrying them beyond Rs. 500—If without jurisdiction—Industrial dispute by whom can be raised—If can be raised on behalf of non-workmen	338
Industrial Disputes Act (XIV of 1947), section 17-A—Industrial award—When comes into operation—Discretion of Tribunal to fix commencement date—Interference by Supreme Court—Practice	338
Industrial dispute—Minimum wage, fair wage and living wage—Meaning of—Fixation of minimum wage for workers in Reserve Bank of India—Acceptance of norms laid down in the Resolution adopted by the Fifteenth Indian Labour Conference—Practicability—Wages of middle class staff in relation to wages of working classes—Determination—Proper co-efficient	338
Industrial dispute—Promotion—Seniority and merit should both have a part—Gratuity—Forfeiture of on dismissal—Legality—Fixation of period for confirma-	

	PAGE
tion and probation—No hard and fast rule can be laid down—Claim by union that it should be allowed to participate in disputes between an individual workman and the management—Tenability	338
Interest Act (XXXII of 1839)—Suit for compensation—Interest for the period prior to institution of the suit—When can be awarded	304
Interpretation of Statutes—'Proviso' unrelated to the main enactment	41
Interpretation of Statutes—Tax legislation—Retrospective operation—Permissibility—If <i>per se</i> involves contravention of Article 19 (1) (f) or (g) of the Constitution of India	234
Landlord and tenant—Landlord not putting tenant in possession of portion of premises—Liability for rent—Doctrine of suspension of rent—Applicability in India	12
Landlord and tenant—Tenancy granted by a written instrument or a tenancy whose origin is not known—Question whether the tenancy is permanent—Determination of—Relevant factors	17
Legal Representatives—Representation—Decree properly obtained against some only of legal representatives—Binding nature on heirs not impleaded—Death of debtor after suit—Suit against legal representatives—Continuation or institution of suit after diligent and <i>bona fide</i> enquiry against some only of the legal representatives of deceased debtor—Heirs not impleaded, bound by the decree—Existence of fraud, collusion or other vitiating factors, and special defence open to the non-impleaded heir—Open to investigation by Court—Binding nature of decree—Question depends not on personal law but on law of procedure—Practice	24
Limitation Act (IX of 1908), Articles 61 and 120—Contract by plaintiff to manufacture finished product out of raw materials supplied by defendant—Raw materials stocked in plaintiff's godown—Later contract cancelled—Suit by plaintiff claiming compensation as bailee for storage and other incidental charges—If governed by Article 61 or 120—Claim under different heads if can be split up for the purpose of applying the bar of limitation	304
Limitation Act (IX of 1908), Articles 134-B and 139—Scope and applicability of Article 134-B—Lease from year to year of lands belonging to a Hindu deity lawfully granted by its manager—Succeeding manager terminating tenancy and filing suit for recovery of the lands—Suit if governed by Article 134-B or 139	17
Limitation Act (IX of 1908), Article 144—Land leased to, an Akhara—Unauthorised sub-lease by Mahant of Akhara—Landlord obtaining possession of such land under a decree for ejectment—Suit by succeeding Mahant for recovery of possession of the land—Limitation	334
Madras Agriculturists Relief Act (IV of 1938), as amended by Madras Act (XXIV of 1950), section 8 <i>Explanation III</i> —Scope—Benefit of <i>Explanation III</i> —When can be availed of	67
Madras Plantations Agricultural Income-tax Act (V of 1955), sections 3, 4, 65—Scope—Agricultural income-tax—Sale of produce of earlier years in the year of account—Income derived, whether exempt—Tax for those years paid after composition—Produce of those years, whether had suffered tax	320
Madhya Pradesh Public Trust Act (XXX of 1951), sections 4, 5 and 8 (1) and 9—Scope—Property registered under the Act as belonging to a public trust—Effect—If conclusive against a person claiming title to the same—Scope of enquiry under section 5—Section 8 (1) by whom can be invoked	299
Metal Corporation India (Acquisition of Undertaking) Act (XLIV of 1965), section 10 and Schedule, Paragraph II (b)	182
Muhammadan law—Gift—Necessary conditions for validity of—Gift of property in the possession of a trespasser—Validity—Suit by plaintiff to recover property in the possession of defendant—Oral gift by plaintiff of suit property during pendency of—Plaintiff dying thereafter—Donee if can claim the property by virtue of the gift	63
Mysore Service Regulations as amended on 29th April, 1955, Rule 294 (a) note 4—Construction—Trained teachers in the Education Department—Age of retirement	256
Orissa Hindu Religious Endowment Act (IV of 1939), section 64 (2)—Suit by person claiming a temple to be a private temple for setting aside order of Commissioner in proceedings under section 64 (2) declaring the temple as public excepted temple—Public if should be impleaded as party to suit—Order 1, rule 8 of the Civil Procedure Code (V of 1908), if applicable of such suit	397
Patna University Act (Bihar Act XXV of 1951), section 34 (b)—Regulation 4 of the Regulations framed in 1961 by the Academic Council of the Patna University under—Regulation 4 requiring 75 per cent. attendance in lectures, tutorials and/or practicals for eligibility for appearance in University examination—If postulates 75 per cent. attendance at lectures, tutorials and/or practicals severally or conjointly	260
Payment of Bonus Act (XXI of 1965), sections 10, 32, 33, 34 (2), 36 and 37—Constitutional validity—Act not invalid as amounting to fraud on Constitution or colourable piece of legislation—Section 36 valid—Section 10 providing for minimum	

bonus irrespective of profits—Does not infringe Article 14 or 31 of the Constitution of India and is valid—Section 37 invalid—Suffers from vice of delegation of legislative power—Sections 33 and 34(2) void as offending Article 14 of the Constitution—Invalidity of sections 33, 34 (2) and 37 does not affect rest of the Act.	189
Penal Code (XLV of 1860), sections 193 and 471—Offence under section 193—Court refusing to accord sanction to prosecute under section 195, Criminal Procedure Code (V of 1898)—Prosecution for offence under section 471—Sustainability	92
Public Companies (Limitation of Dividends): Ordinance (XXIX of 1948), sections 3 and 12 and Public Companies (Limitation of Dividends) Act (XXX of 1949), section 13	329
Rajasthan Passengers and Goods Taxation (Amendment and Validation) Act (XXII of 1964), sections 2 and 4—Validity	234
Rajasthan Tenancy Act (III of 1955), sections 15 and 161—Scope and effect—Tenants inducted by usufructuary mortgagee in possession when Tenancy Act came into force—Mortgagor if entitled to eject them after redemption of the mortgage	60
Sale of Goods Act (III of 1930), sections 20 and 25 (1)—Forest Contract Rules, Rules 8 and 18—Felled trees in forest sold by Government by auction—Part of price paid on date of auction; the rest to be paid in instalments—After the acceptance of the bid of purchaser by Divisional Forest Officer, deed of contract signed by both—Later auctioned trees destroyed by fire in forest—Thereafter the contract countersigned by Chief Conservator of Forests as required by rules—Property in auctioned trees if passed to buyer before the outbreak of fire—Purchaser or on his default his surety if liable to pay the unpaid portion of the purchase price	311
Sugar cane Cess (Validation) Act (XXXVIII of 1961), section 3—Scope and validity—If colourable legislation—Commission payable to Sugar cane Development Council—If can be collected for season when the Council had not yet come into existence	98
Travancore-Cochin General Sales Tax Act (XI of 1925, M.E.)—Assessment for 16th August, 1950 to 31st March, 1951—Turnover—If can include sales tax collected—Assessment on turnover including such amount—Suit for refund of excess collected—Jurisdiction of civil Court	55
U.P. Intermediate Education Act (II of 1921), as amended by (U.P. Act XXXV of 1958), sections 16-A to 16-I—Competency of Legislature to enact under Entry 11 of List II of Seventh Schedule to the Constitution of India—Section 16-F (4) if confers uncontrolled power—Section 16-B (3) read with section 16-D (3) if unreasonable—Section 16-D (4) if contravenes Articles 19 and 31 of the Constitution of India—Section 16-H if contravenes Article 14 of the Constitution	15
Wealth-tax Act, 1957 (Central Act XXVII of 1957), section 5 (1) (xxi)—Wealth-tax—Exemption—Assessee, an industrial undertaking—New and separate unit set up after the Act—Not wealth-employed in establishing the new unit—Construction of factory buildings, erection of plant and machinery after the Act—Exemption—Period of exemption—Setting up unit—Commencement of operations for the establishment of unit—Distinction	123
Will—Construction—Disposition in favour of a person—Beneficiary if takes as a <i>persona designata</i> or by reason of his fulfilling certain legal status—Determination of—Festiva	15

TABLE OF CASES IN THIS PART

SUPREME COURT OF INDIA

	PAGE
Abdul Karim Khan v. Munl. Committee	29
All India R.B. Employees' Assn. v. R.B. of India	33
Ananda Nambiar v. Chief Secy., Govt. of Madras.. .. .	27
Badriprasad v. State of M.P.	31
Calcutta Tramways Co., Ltd. v. Corpn. of Calcutta	30
Chandulal Harjiwandas v. C.I.T., Gujarat	29
C.I.T., Bombay City I v. Godavari Sugar Mills, Ltd.	32
C.I.T., Madras v. Prithivi Insurance Co., Ltd.	40
M/s. O. R.M. M. SP. SV. Firm v. C.I.T., Madras	25
Dr. Guranditta Mal Kapur v. Mahant Ram Saran	33
Joint Family of Udayan Chinubhai v. C.I.T., Gujarat	32
Martin Burn, Ltd. v. Corpn. of Calcutta	38
Millowners' Association v. Textile Labour Association	36
S.S. Nirmal Chand v. Union of India	26
Paramananda Mahapatra v. Commr. of H.R.E.	39
M. M. Parikh v. Navanagar Transport and Ind., Ltd.	28
Principal, Patna College, Patna v. K.S. Raman	26
Rajalinga Raja v. State of Madras.. .. .	32
Ram Kumar Agarwal v. C.I.T., Calcutta	29
State of Mysore v. Padmanabhacharya	25
Union of India v. Watkins Mayor & Co.	30

INDEX OF REPORTS

Bombay Industrial Relations Act (XI of 1947), sections 42 and 73—Scope of—Award subsisting—No notice of change given by either party—Reference to Industrial Court by the Government—Maintainability—Consumers price Index number—Changes made by Government—Employer paying under the old scheme—'industrial dispute'	360
Calcutta Municipal Act (III of 1923), sections 127, 131, 139 to 142 and 147—"Annual value" of premises let or intended to be let—Determination of—Provision applicable—Appeal to Small Cause Court—Assessment set aside with direction to re-value under section 127 (a)—Appeal to High Court by the Corporation—Order of lower Court maintained but remanded to Small Cause Court itself to re-value under clause (a) of section 127—Validity of remand order	387
Calcutta Tramways Act (W.B. Act XXV of 1951), section 5, proviso—Scope—Proper construction	308
Constitution of India (1950), Articles 77 (2) and 359—Order of President, dated 3rd November, 1962, as amended on 11th November, 1962 and issued under Article 359 (1)—Validity and effect—Petition under Article 32 of the Constitution of India challenging a detention order on ground that rule 30 (1) (b) of the Defence of India Rules (1962) under which the order is made is invalid, or on the ground that the detention order was made <i>malafide</i> —If barred	272
Constitution of India (1950), Articles 79, 85 (1), 86 (1), 100 (1) and 105—Scope.. .. .	272
Constitution of India (1950), Article 226—Orders passed by educational authorities under relevant regulations framed by the University—Interference with by High Court in writ petition—Limitations	260
Constitution of India (1950), Article 309, Proviso—Scope—Notification, dated 25th March, 1959 made by Mysore Governor under—Validity	256
Contract Act (IX of 1872), section 148—Iron sheets belonging to defendant supplied to plaintiff under a contract by latter to manufacture drums for the defendant—Later contract cancelled—Suit by plaintiff as bailee for compensation for storage of iron sheets in its godown—Measure of—Notice by plaintiff claiming storage charges at certain rate—No reply from defendant—If amounts to implied undertaking to pay godown rent at that rate	304
Contract Act (IX of 1872), section 196—Sale of cut-trees in forest on behalf of Government—Ratification after goods were destroyed by fire—Validity	311

Civil Procedure Code (V of 1908), section 80 and Order 21, rule 63—Scope and applicability of section 80—Suit under Order 21, rule 63 against Government—Provisions of section 80 if attracted

267

Defence of India Rules (1962), rule 30 (1) (b)—If invalid in so far as it permits a Member of Parliament to be detained

272

Hindu undivided family—Partition between groups of members of family—Whether can be recognised by Income-tax Officer—Partition between G and his wife and sons—Wife and sons forming one group—Share allotted to wife and sons remaining undivided—Order recording partition—Wife and sons whether constitute Hindu undivided family and assessable in that status

323

Income-tax Act (XI of 1922), section 4 (3) (vii)—Adventure in the nature of trade—Assessee, a firm of sharebrokers—Joint negotiations to purchase controlling interest in a company—Subsequent agreement with rival purchaser to secure and transfer controlling interest—Amount received from rival purchaser on completion of transaction—Whether revenue receipt or non-recurring casual receipt

296

Income-tax Act (XI of 1922), section 15 (1)—Exemption—Life insurance—"Children's Deferred Endowment Assurance"—Policy on minor's life taken by father—Premium paid out of minor's taxable income—Rebate, whether admissible in minor's assessment

292

Income-tax Act, 1922 (XI of 1922), section 23-A (after amendment in 1955) and section 34(3)—Undistributed income—Profits of company—Declaration of dividend below statutory percentage—Order imposing additional super-tax under section 23-A—Whether an order of assessment—Bar of limitation under section 34 (3)—Whether applies to such an order

285

Income-tax Act (XI of 1922), section 23-A—Deemed dividend—Dividend declared at Annual General Meeting—Maximum permitted under law then in force—Subsequent repeal of that law within six months of the meeting—Order of deemed distribution—Invalid

329

Income-tax Act (XI of 1922), section 24(2)—Loss—Set-off—Same business—Criterion—Interconnection, interlacing interdependence and unity—Closure of one business without affecting the other business—Not a decisive test—Assessee a company carrying on life insurance and general insurance business—Allowed under the memorandum of association—Common administrative organisation and common expenses—Loss in life business against profits in general business—Set-off—Allowable—Same business

400

Income-tax Act (XI of 1922), section 25—Discontinuance—Business charged to tax under the 1918 Act—Exemption—Assessee, firm—Business in India and outside India—Profits of foreign business—Receipt—Taxed under the 1918 Act—Discontinuation of firm—Foreign business and rental income from houses owned by foreign firm—Relief on discontinuance—Allowable—Receipt of income derived from foreign business—Charge under the 1918 Act—Amounts to assessment on foreign business—Business, profession or vocation—Not a unit of assessment—Charge on the owner of the business—Exemption on discontinuance—General—Not restricted to the head "profits and gain of business"—Division into various heads only for computation—Rental income from property owned by foreign firm—Relief on discontinuance—Tenable

251

Income-tax Act (XI of 1922), sections 25-A, 34—Re-assessment—Partition of Hindu undivided family—Order recognising partition—Re-assessment proceedings ignoring such order—Validity—Nature of order recording partition

323

Industrial Dispute—Minimum wage, fair wage and living wage—Meaning of—Fixation of minimum wage for workers in Reserve Bank of India—Acceptance of norms laid down in the Resolution adopted by the Fifteenth Indian Labour Conference—Practicability—Wages of middle class staff in relation to wages of working classes—Determination—Proper co-efficient

338

Industrial Dispute—Promotion—Seniority and merit should both have a part—Gratuity Forfeiture on dismissal—Legality—Fixation of period for confirmation and probation—No hard and fast rule can be laid down—Claim by union that it should be allowed to participate in disputes between an individual workman and the management—Tenability

338

Industrial Disputes Act (XIV of 1947) (as amended in 1956), sections (2) (k), 2 (s) (iv) and 10 (1-A)—Supervisor when ceases to be a workman under section 2 (s) (iv)—Word "Supervise" and its derivatives—Meaning of—Class II staff of Reserve Bank of India if employed in supervisory capacity—Reference under section 10 (1-A) of dispute in regard to supervisors drawing less than Rs. 500 per month but on scales carrying them beyond Rs. 500—If without jurisdiction—Industrial dispute by whom can be raised—If can be raised on behalf of non-workmen

338

Industrial Disputes Act (XIV of 1947), section 17-A—Industrial award—When comes into operation—Discretion of Tribunal to fix commencement date—Interference by Supreme Court—Practice

338

	PAGES.
Interest Act (XXXII of 1839)—Suit for compensation—Interest for the period prior to Institution of the suit—When can be awarded	304
Limitation Act (IX of 1908), Articles 61 and 120—Contract by plaintiff to manufacture finished product out of raw materials supplied by defendant—Raw materials stocked in plaintiff's godown—Later contract cancelled—Suit by plaintiff claiming compensation as bailee for storage and other incidental charges—If governed by Article 61 or 120—Claim under different heads if can be split up for the purpose of applying the bar of limitation	304
Limitation Act (IX of 1908), Article 144—Land leased to an Akhara—Unauthorised sub-lease by Mahant of Akhara—Landlord obtaining possession of such land under a decree for ejectment—Suit by succeeding Mahant for recovery of possession of the land—Limitation	334
Madras Plantations Agricultural Income-tax Act (V of 1955), sections 3, 4, 65—Scope—Agricultural Income-tax—Sale of produce of earlier years in the year of account—Income derived, whether exempt—Tax for those years paid after composition—Produce of those years, whether had suffered tax	320
Madhya Pradesh Public Trust Act (XXX of 1951), sections 4, 5 and 8 (1) and 9—Scope—Property registered under the Act as belonging to a public trust—Effect—If conclusive against a person claiming title to the same—Scope of enquiry under section 5—Section 8 (1) by whom can be invoked	299
Mysore Service Regulations as amended on 29th April, 1955, Rule 294 (a) note 4—Construction—Trained teachers in the Education Department—Age of retirement..	256
Orissa Hindu Religious Endowment Act (IV of 1939), section 64 (2)—Suit by person claiming a temple to be a private temple for setting aside order of Commissioner in proceedings under section 64 (2) declaring the temple as public excepted temple—Public if should be impleaded as party to suit—Order 1, rule 8 of the Civil Procedure Code (V of 1908), if applicable of such suit	397
Patna University Act (Bihar Act XXV of 1951), section 34 (b)—Regulation 4 of the Regulations framed in 1961 by the Academic Council of the Patna University under—Regulation 4 requiring 75 per cent attendance in lectures tutorials and/or practicals for eligibility for appearance in University examination—If postulates 75 per cent attendance at lectures, tutorials and/or practicals severally or conjointly..	260
Public Companies (Limitation of Dividends) Ordinance (XXIX of 1948), sections 3 and 12 and Public Companies (Limitation of Dividends) Act (XXX of 1949), section 13	329
Sale of Goods Act (III of 1930), sections 20 and 25 (1)—Forest Contract Rules, rules 8 and 18—Felled trees in forest sold by Government by auction—Part of price paid on date of auction, the rest to be paid in instalments—After the acceptance of the bid of purchaser by Divisional Forest Officer, deed of contract signed by both—Later auctioned trees destroyed by fire in forest—Thereafter contract countersigned by Chief Conservator of Forests as required by rules—Property in auctioned trees if passed to buyer before the out-break of fire—Purchaser or on his default his surety if liable to pay the unpaid portion of the purchase price	311

ERRATA

At page 145 in line 4 read "B. Sen, Senior Advocate" for "A. S. Bobde, Advocate."

At page 162 line 13 after the figures "1955-1956" insert the following "appellant was asked to furnish wealth statement which was actually filed, and after that read "From" for "From".

At page 199 line 21 after the words section 32 insert the following "which excludes from the operation of the Act certain specified classes of employees can be deter" instead of the words "would be deter".

[SUPREME COURT]

K. Subba Rao, C.J., R. S. Bachawat
and J. M. Shelat, JJ.
25th October, 1966.

Gurbax Singh v.
The State of Punjab.
C.A. No. 708 of 1964.

Punjab Security of Lands Tenures Act (X of 1953) as amended by Act XLVI of 1957 hereinafter called the Act—Section 5-B—Rules made under the Act—Scope and purpose of the Act—Meaning of words “Reservation and Selection”.

The expressions “reservation” and “selection” involve the same process and indeed, to some extent, they are convertible, for one can reserve land by selection and another can select land by reservation. The argument based on section 9 is also without force. It is true that under section 9 (1) (i) a tenant of the area reserved under the Act can be evicted and there is no other clause enabling the land-owner to evict a tenant from the selected area. It is said that “reserved area” is defined and that “selected area” does not fall under that definition and that, therefore, the effect of section 9 is that a tenant in the selected area cannot be evicted. But, it may be noticed that under section 9 (1) (i) the expression “reserved area” is not used, but instead the expression “the area reserved under the Act” is mentioned. As we have said earlier, the land selected by the land-owner out of the permissible area can legitimately be described as the area reserved under the Act. If that be the interpretation of section 5 (1), section 5-B and section 9 (1), it follows that under section 18 the tenants cannot claim to purchase the land from the land-owner under section 18, for it is included in the reserved area of the land-owner.

It may be that one of the objects of the amendment was to enlarge the discretion of the land-owner in the matter of reservation or it may be that in the matter of selection the land-owner has to conform to the provisions of section 5 (1). We leave open that question for future decision.

Bhawani Lal and Mohan Lal Aggarwal, Advocates, for Appellant.

Gopal Singh, Advocate, for Respondent No. 3.

G.R.

Appeal dismissed.

[SUPREME COURT]

K. Subba Rao, C.J., M. Hidayatullah,
S.M. Sikri, R.S. Bachawat and
J.M. Shelat, JJ.
27th October, 1966.

Sri Krishna Coconut Co. v.
The East Godavari Coconut
and Tobacco Market Committee.
C.As. Nos. 858-861 of 1964.

Madras Commercial Crops Market Act (XX of 1933)—Interpretation of section 11 (1) and rule 28—Andhra Pradesh Act of 1953 and Adaptation of Laws Order—The competence of the Market Committee to levy fee.

The question from the very inception was whether the Committee was competent to levy the fee in question under section 11 (1). To answer that question the Court necessarily had to enquire on which transactions could the said fee be levied under section 11 (1) and whether it was rightly levied by the Committee. The High Court answered these questions by holding that it was levied on the transaction effected by the appellants with those from whom they bought the said goods, that section 11 (1) dealt with those transactions and was not therefore concerned with the subsequent sales entered into by the appellants with their customers outside the notified area. Since according to the High Court, those transactions were admittedly effected within the notified area the levy was valid and warranted under section 11 (1). In our view the High Court approached the question from a correct angle and therefore there was no question of its having allowed the Committee to change its case or to make out a new case.

The incidence of the fee under section 11 (1) is on the goods thus "bought and sold". This last interpretation was favoured by the High Court of Madras in *Louis Dreyfus & Co. v. South Arcot Groundnut Market Committee*, I.L.R. (1946) Mad. 127 : (1945) 1 M.L.J. 414 : A.I.R. 1945 Mad. 383, which has been accepted by the High Court in the present case.

In our view the construction placed by the High Court on section 11 (1) was a correct construction and therefore the respondent Committee had rightly charged the appellant with the said fee.

G. B. Agarwala, Senior Advocate (*T. V. R. Tatachari*, Advocate, with him), for Appellants (In all the appeals).

P. Ram Reddy, Senior Advocates (*K. R. Sharma*, Advocate, with him), for Respondent (In all the appeals).

G.R.

Appeal dismissed.

[SUPREME COURT]

K. Subba Rao, C.J., R. S. Bachawat
and *J. M. Shelat, J.J.*
28th October, 1966.

Hari Chand Sarda v.
Mizo District Council.
C.A. No. 648 of 1964.

Lushai Hills District (Trading by Non-Tribals) Regulation (II of 1953)—Article 19 (1) (c) and (g) of the Constitution—Sixth Schedule of the Constitution—Reasonable restrictions imposed in the interest of General Public under Article 19 (6) of the Constitution.

By Majority :—Relying upon its earlier decisions reported in (1952) S.C.R. 597 ; (1954) S.C.R. 982 ; (1955) S.C.R. 636 ; (1955) 1 S.C.R. 686 ; (1960) 2 S.C.R. 609 and (1961) 3 S.C.R. 135, the Court held :

These authorities clearly demonstrate that the fundamental rights of a citizen to carry on trade can be restricted only by making a law imposing in the interest of the general public reasonable restrictions on the exercise of such a right, that such restrictions should not be arbitrary or excessive or beyond what is required in the interest of the general public and that an uncontrolled and uncanalized power conferred on the authority would be an unreasonable restriction on such right. Though a legislative policy may be expressed in a statute, it must provide a suitable machinery for implementing that policy in such a manner that such implementation does not result in undue or excessive hardship and arbitrariness. The question whether a restriction is reasonable or not is clearly a justiciable concept and it is for the Court to come to one conclusion or the other having regard to the considerations laid down in *The State of Madras v. V. G. Row*. It is also well established that where a provision restricts any one of the fundamental rights it is for the State to establish the reasonableness of such restriction and for the Court to decide in the light of the circumstances in each case, the policy and the object of the impugned legislation and the mischief it seeks to prevent.

The Regulation contains no provisions on the basis of which an applicant would know what he has to satisfy in order to entitle him to a licence. The power to grant or not to grant is thus entirely unrestrained and unguided. The Regulation leaves a trader not only at the mercy of the Committee but also without any remedy. Therefore even if the Sixth Schedule can be said to contain a policy and the Regulation may be said to have been enacted in pursuance of such a policy the analysis of the Regulation shows that that is not sufficient. Even if a statute lays down a policy it is conceivable that its implementation may be left in such an arbitrary manner that the statute providing for such implementation would amount to an unreasonable restriction. A provision which leaves an unbridled power to an authority cannot in any sense be characterised as reasonable. Section 3 of the Regulation is one such provision and is therefore liable to be struck down as violative of Article 19 (1) (g).

For the reasons aforesaid, we would declare that section 3 of the Regulation is an unreasonable restriction on the fundamental right guaranteed under Article 19 (1) (g) and therefore void. The said order dated 11th July, 1960 having been

made under such a void provision is illegal and void. We would therefore set aside the said order as having been made under an illegal provision of law and allow the appeal with costs.

Sukumar Ghose, Advocate, for Appellant.

G.R.

Appeal allowed.

[SUPREME COURT]

*K. Subba Rao, C.J., M. Hidayatullah,
S. M. Sikri, R. S. Bachawat and*

*Lala Ram v.
The Supreme Court of India.*

*J. M. Shelat, J.J.
1st November, 1966.*

R.P. No. 8 of 1966.

Supreme Court Rules, 1966—Constitutional validity of Order 40, rule 2 (2).

Order 40, rule 2 (2) of the Supreme Court Rules, 1966, reads:—

“No application for review in a civil proceeding shall be entertained unless the party seeking review furnished to the Registrar of this Court at the time of filing the petition for review cash security to the extent of two thousand rupees for the costs of the opposite party.”

It is true that in some cases and under certain circumstances the pre-condition to furnish security may be highly prejudicial to the interest of a petitioner who has a real grievance. Such a result is inevitable in the application of any rule. But that in itself cannot invalidate a rule which admittedly this Court has power to make under Article 145 of the Constitution. In appropriate cases this Court has the residuary power under Order 47, rule 1 of the Rules, for sufficient reasons shown to excuse the parties from compliance with any of the requirements of the Rules and it may also give such directions in matters of practice and procedure as it may consider just and expedient.

It is then contended that the enforcement of Order 40, rule 2 (2) of the Rules will lead to unjustified discrimination between parties and, therefore, it offends Article 14 of the Constitution. The discrimination alleged lies in the fact that while security need not be given as a pre-condition for the filing of any proceeding in this Court, it has to be given only in the case of a review petition. There is certainly a reasonable nexus between such a condition and the differences between parties taking different proceedings in this Court. The main distinction which makes all the difference is that in the case of a review petition this Court is asked to reopen a matter which has been closed after hearing the parties. This is a sufficient reason to sustain the distinction and it affords a reasonable nexus to the objects sought to be achieved by the imposition of the pre-condition.

But, having regard to the circumstances of the case, in exercise of our discretionary power, we reduce the amount of cash security from Rs. 2,000 to Rs. 250 only. The said amount will be paid within two weeks from to-day.

Hiralal Jain, Advocate, for Petitioner.

Narain De, Additional Solicitor-General of India (*R. H. Dhebar*, Advocate with him), for Attorney-General for India (on notice by the Court).

G.R.

Order accordingly.

[SUPREME COURT]

K. Subba Rao, C.J., M. Hidayatullah,
S. M. Sikri, R. S. Bachawat and
J. M. Shelat, JJ.

Govind Dattatray Kelkar,
The Chief Controller of Imports
and Exports.

1st November, 1966.

W.P. No. 40 of 1965.

Constitution of India (1950), Articles 14, 16 and 309—Appointments made on ad hoc basis as Assistant Controller of Import and Export without consulting Union Public Service Commission—Their Constitutional Validity—Principle of "carry forward".

The relevant law on the subject is well settled and does not require further elucidation. Under Article 16 of the Constitution, there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State or to promotion from one office to a higher office thereunder. Article 16 of the Constitution is only an incident of the application of the concept of equality enshrined in Article 14 thereof. It gives effect to the doctrine of equality in the matter of appointment and promotion. It follows that there can be a reasonable classification of the employees for the purpose of appointment or promotion. The concept of equality in the matter of promotion can be predicated only when the promotees are drawn from the same source. If the preferential treatment of one source in relation to the other is based on the differences between the said two sources, and the said differences have a reasonable relation to the nature of the office or offices to which recruitment is made, the said recruitment can legitimately be sustained on the basis of a valid classification. There can be cases where the differences between the two groups of recruits may not be sufficient to give any preferential treatment to one against the other in the matter of promotions, and in that event a Court may hold that there is no reasonable nexus between the differences and the recruitment. In short, whether there is a reasonable classification or not depends upon the facts of each case and the circumstances obtaining at the time the recruitment is made. Further, when a State makes a classification between two sources of recruitment, unless the classification is unjust on the face of it the onus lies upon the party attacking the classification to show by placing the necessary material before the Court that the said classification is unreasonable and violative of Article 16 of the Constitution: see *Banarsidas v. The State of Uttar Pradesh*, (1955) S.C.R. 357; *All India Station Masters' and Assistant Station Masters' Association v. General Manager, Central Railways*, (1960) S.C.J. 344 : (1960) 2 S.C.R. 311; and *The General Manager, Southern Railway v. Rangachari*, (1961) 2 M.L.J. (S.C.) 71 : (1961) 2 An. W.R. (S.C.) 71 : (1961) 2 S.C.J. 424 : (1962) 2 S.C.R. 586.

It was then suggested that the ratio of 75 per cent. for direct recruits and 25 per cent. for promotion from departmental candidates was discriminatory. This point directly arose for consideration in *Mervyn Coutinho v. The Collector of Customs, Bombay*, Writ Petition No. 97 of 1964. Therein, this Court accepted the validity of rotational system where the recruitment to a cadre was from two sources and held that such a system did not violate the principle of equal opportunity enshrined in Article 16 (1) of the Constitution.

H. R. Gokhale, Senior Advocate (G. L. Sanghi, Advocate and B. R. Agarwala, Advocate of M/s. Gagrati & Co., with him), for Petitioners.

Niren De, Additional Solicitor-General of India (R. Ganapathy Iyer and R. N. Sachthey, Advocates, with him), for Respondents Nos. 1 to 3.

N. S. Bindra, Senior Advocate (K. Baldev Mehta, Advocate, with him), for Respondents Nos. 11, 14 and 27.

G.R.

Petition dismissed.

[SUPREME COURT]

K. N. Wanchoo, J. M. Shelat and
G. K. Mitter, JJ.
1st November, 1966.

Samarendra Nath Sinha v.
Krishna Kumar Nag.
C.A. No. 707 of 1964.

Civil Procedure Code (V of 1908)—Order 34, rule 4 (1)—Preliminary objections—Certificate under Article 133 (1) (a) (d) not valid.

On merits, two questions were raised: (1) whether the trial Court was competent to pass a final decree for foreclosure though the preliminary decree was for sale and (2) whether the respondent had the right to contend that he was entitled to redeem the said mortgage in view of the fact that he was the execution purchaser of part of the equity of redemption *pendente lite*.

The judgment of the High Court is unfortunately laconic and one wishes that the learned Judges had taken us a little more into confidence by giving some reasons at least. Nonetheless, it is clear that they decided both the questions by holding that the respondent had still sufficient interest in the matter and therefore had *locus standi* and by setting aside the final decree and directing the trial Court to decide the question as to whether it could correct the said preliminary decree in accordance with the directions given by them they held that the respondent was entitled to participate in those proceedings and plead that the final decree should be one for sale and consequently he was entitled to redeem the said mortgage. There can be no question that the two questions raised in the appeal before the High Court were disposed of finally inasmuch as the said final decree was set aside as not being valid and binding on the respondent and the question of redemption by him which was extinguished by that final decree was re-opened entitling the respondent to contend that he had the right to redeem and to hold the said property. In these circumstances, the preliminary objection raised by Mr. Chatterjee cannot be sustained and the certificate must be held to be competent.

It is true that section 52 strictly speaking does not apply to involuntary alienations such as Court sales but it is well established that the principle of *lis pendens* applies to such alienations. It follows that the respondent having purchased from the said Hazra while the appeal by the said Hazra against the said preliminary decree was pending in the High Court, the doctrine of *lis pendens* must apply to his purchase and as aforesaid he was bound by the result of that suit. In the view we have taken that the final foreclosure decree was competently passed by the trial Court, his right to equity of redemption was extinguished by that decree and he had therefore no longer any right to redeem the said mortgage. His appeal against the said final decree was misconceived and the High Court was in error in allowing it and in passing the said order of remand directing the trial Court to re-open the question of redemption and to allow the respondent to participate in proceedings to amend the said preliminary decree.

In the result, we allow the appeal, set aside the judgment and decree passed by the High Court and restore the judgment and decree passed by the trial Court. The respondent will pay the appellant's costs all throughout.

Niren De, Additional Solicitor-General of India (N. R. Basu and E. Udayaratnam, Advocates, with him), for Appellants.

P. K. Chatterjee, B. C. Mitra and P. K. Bose, Advocates, for Respondent.

G.R.

Appeal allowed.

[SUPREME COURT]

K. N. Wanchoo, G. K. Mitter and
C. A. Vaidialiangam, JJ.
7th November, 1966.

Raj Kishore Prasad Narayan Singh *alias*
Shri Krishna Vallabh Narayan Singh v.
Ram Pratap Panday.
C.A. No. 759 of 1964.

Bihar Land Reforms Act, 1950 (XXX of 1950) hereinafter referred to as the Act—Sections 3, 18 (1) (a)—Order 23, Civil Procedure Code.

The scheme of the Act has been considered by this Court in two decisions: *Raja Sailendra Narayan Bhanj Deo v. Kumar Jagat Kishore Prasad Narayan Singh*, (1962) 2 S.C.R. (Supp.) 119 and *Krishan Prasad v. Gauri Kumari Devi*, (1962) 3 S.C.R. (Supp.) 564.

From the principles laid down by this Court in the above two decisions, it follows that where the whole of the property mortgaged is an estate, there can be no doubt that the procedure prescribed by Chapter IV has to be followed, in order that the amount due to the creditor should be determined by the Claims Officer and the decision of the Claims Officer or the Board has been made final by the Act.

What then is the position, when a mortgage comprises, not only properties which have vested in the State under the Act but also takes in other items of properties which are outside the purview of the Act? Under those circumstances, is the mortgagee still bound to apply to the Claims Officer and follow the procedure indicated by the Act? This raises the question left undecided in *Krishan Prasad's case*, (1962) 3 S.C.R. (Supp.) 564.

Therefore under those circumstances, we are not inclined to agree with the observations of the Patna High Court in the decisions referred to above that in cases where a mortgaged property consists of both vested and non-vested items, it is open to the creditor to make an election as to the choice of his remedies and that election is to be made by a creditor giving up his right of filing a claim under section 14 with respect to the items vested in the State or prosecuting a suit or execution proceeding in a civil Court, in respect of items which have not so vested in the State. The Act, so far as we can see, gives jurisdiction to the authorities concerned only in respect of properties, which have vested in the State; and the claims that are filed and adjudications made by the authorities concerned, under the Act, can only be with reference to estates that have vested in the State. In our opinion, the prohibition contained in sections 4 (d) and 35 of the Act must also relate only to matters which can form properly the subject of a claim or an adjudication under the Act.

We accordingly grant the request of the appellant to withdraw Claim Case No. 14 of 1956 filed by him before the Claims Officer, Gaya, in terms of the appellant's application dated 9th November, 1959, and made to the Board. But, as and when the appellant seeks any remedy, to enforce his mortgage, as against the properties which have not vested under the Act, that Tribunal or Court may have to apply the principle of marshalling.

In the result, the appeal is allowed and the claim petition is permitted to be withdrawn, as indicated above. We make it very clear that, we have not expressed any opinion on the various findings recorded, either by the Claims Officer, or by the learned Judge.

N. C. Chatterjee, Senior Advocate (D. Goburdhun, Advocate, with him), for Appellants.

B. P. Jha, Advocate, for Respondents.

G.R.

Appeal allowed.

[SUPREME COURT]

K. N. Wanchoo and

G. K. Mitter, JJ.

8th November, 1966.

Janak Raj v.

Gurdial Singh.

C.A. No. 1322 of 1966.

Civil Procedure Code (V of 1908), Order 21, rules 82 to 103—Whether a sale of immovable property in execution of a money decree ought to be confirmed when it is found that the ex parte decree which was put into execution has been set aside subsequently.

For the reasons already given and the decisions noticed, it must be held that the appellant-auction purchaser was entitled to a confirmation of the sale notwithstanding the fact that after the holding of the sale the decree had been set aside. The policy of the Legislature seems to be that unless a stranger auction-purchaser is protected against the vicissitudes of the fortunes of the suit, sales in execution would not attract customers and it would be to the detriment of the interest of the borrower and the creditor alike if sales were allowed to be impugned merely because the decree was ultimately set aside or modified. The Code of Civil Procedure of 1908 makes ample provision for the protection of the interest of the judgment-debtor who feels that the decree ought not to have been passed against him. On the facts of this case it is difficult to see why the judgment-debtor did not take resort to the provisions of Order 21, rule 89. The decree was for a small amount and he could have easily deposited the decretal amount besides 5 per cent. of the purchase money and thus have the sale set aside. For reasons which are not known to us he did not do so.

In our opinion, on the facts of this case, the sale must be confirmed.

Appellant in person.

D. D. Sharma and M. C. Bhattia, Advocates, for Respondent No. 1.

G.R.

Appeal allowed.

[SUPREME COURT]

K. Subba Rao, C.J., J. C. Shah,

S. M. Sikri, V. Ramaswami and

C. A. Vaidialingam, JJ.

Mangal Singh v.

Union of India.

C.A. No. 2314 of 1966.

17th November, 1966.

Punjab Reorganisation Act, 1966—Articles 270 (1) and 371-A (2) (h) of the Constitution.

Power with which the Parliament is invested by Articles 2 and 3, is power to admit, establish, or form new States which conform to the democratic pattern envisaged by the Constitution; and the power which the Parliament may exercise by law is supplemental, incidental or consequential to the admission, establishment or formation of a State as contemplated by the Constitution and is not power to override the constitutional scheme. No State can therefore be formed, admitted or set up by law under Article 4 by the Parliament which has not effective legislative executive and judicial organs.

Power to reduce the total number of members of the Legislative Assembly below the minimum prescribed by Article 170 (1) is, in our judgment, implicit in the authority to make laws under Article 4. Such a provision is undoubtedly an amendment of the Constitution, but by the express provision contained in clause (2) of Article 4, no such law which amends the First and the Fourth Schedule or which makes supplemental, incidental and consequential provisions is to be deemed an amendment of the Constitution for the purpose of Article 368.

On the reorganisation of the old State of Punjab, adjustments had to be made in the membership of the Legislative Council. No such adjustment as would strictly conform to the requirements of Article 171 (3) could however be made without fresh elections. The Parliament therefore adopted an *ad hoc* test, and

unseated members who were residents in the Territory of Haryana and Himachal Pradesh.

The new State of Haryana is uni-cameral. It is not claimed, and cannot be claimed, that a resident of the State of Haryana is, merely because of that character, entitled to sit in the Punjab Legislative Council. By allowing the members from the Chandigarh area to continue to remain members of the Legislative Council of the new State of Punjab, no right of the residents of Haryana is therefore violated.

M. C. Setalvad, Senior Advocate (*Ravinder Narain* and *J. B. Dadachanji*, Advocates, of Messrs. *J. B. Dadachanji & Co.*, with him), for Appellants.

S. V. Gupte, Solicitor-General of India (*R. Ganapathy Iyer*, *R. N. Sachthy* and *R. H. Dhebar*, Advocates, with him), for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT]

R. S. Bachawat and

J. M. Shelat, JJ.

13th December, 1966.

Lallan Prasad

Rahmat Ali

C.A. No. 776 of 1964.

Contract Act (IX of 1872), sections 172 to 176—Pledge of movables—Debt evidenced by promissory note—Suit on—Pledgee denying pledge—Not in a position to return the goods pledged—If entitled to decree against the promissory note.

The two ingredients of a pledge are: (1) it is essential that the property pledged should be actually or constructively delivered to the pledgee, and (2) the pledgee has a special property in the pledged goods but the general property therein remains in the pledgor and wholly reverts to him on discharge of the debt. A pledge is therefore a security for a debt.

The pledgor has an absolute right to redeem the property pledged on tender of the amount of the debt and the pledgee has the right to sell the goods pledged and when he sells the same following the procedure prescribed he has to give credit to the amount realised by such sale and the right to redeem is extinguished as regards the property so sold.

The pledgee has also a right of action for his debt, notwithstanding the possession of pledged goods; but if the pledgee is unable, by his default, to return the goods against payment of the debt that is a good defence to the action.

Where therefore, as in the instant case, the pledgee instituted the suit, for recovery of the debt evidenced by a promissory note, alleging that he was not given possession of the pledged goods (i.e. he is not in a position to restore possession to the pledgor of the movables) he will not be entitled to a decree if it is found by the Court that he had been put in possession of the property under the contract of pledge.

O. P. Rana, Advocate, for Appellant.

J. B. Goyal, Advocate, for Respondent No. 1.

K.G.S.

Appeal dismissed.

[SUPREME COURT.]

*N. Wanchoo, J. M. Shelat and
G. K. Mitter, JJ.*
14th September, 1966.

*Har Swarup v.
Brij Bhushan Saran.*
C.A. No. 1141 of 1965.

Representation of the People Act (XLIII of 1951), section 123(2) read with proviso (a) (i) —Corrupt practice by a candidate—Section 90 (3) and 82 (b) and 37, 79 (b)—Meaning of undidate—Effect of withdrawal—A.I.R. 1959, Patna 250, overruled.

Purity of elections is a matter of great importance, and it is for the purpose of maintaining this purity that we have the provisions contained in section 123 of the Act. There is also no doubt that if a covering candidate (like Raturi Vaid) is not treated as a candidate till the date of his withdrawal, he would be free to commit all kinds of corrupt practices defined in section 123 of the Act on behalf of the candidate whom he covers with impunity. This could not be the intention of the Act and that is why learned Counsel for the appellants had to concede that if he alleged corrupt practice had been committed before the date of withdrawal, it would be necessary to join Raturi Vaid as a respondent under section 82 (b). But the argument is that as the alleged corrupt practice was committed after the date of his withdrawal he would not be a candidate within the meaning of section 82 (b). We are of opinion that if the effect of withdrawal is said to be that a person nominated can no longer be considered to be a candidate only after his withdrawal, the date of withdrawal cannot be a dividing line as to the time upto which he can be treated as a candidate and the time after which he cannot be treated as a candidate. If purity of elections has to be maintained a person who is a candidate as defined in section 79 (b) of the Act will remain a candidate even after he withdraws till the election is over, and if he commits a corrupt practice whether before or after his withdrawal he would be a necessary party under section 82 (b) of the Act. We are therefore of opinion that the view taken by the Patna High Court in A.I.R. 1959 Pat. 250 on which reliance has been placed on behalf of the appellants is not correct and the decision of the High Court under appeal is correct.

Naunit Lal, Advocate, for Appellants.

Veda Vyasa, Senior Advocate, (*K. K. Jain*, Advocate, with him), for Respondent No. 1.

G.R.

Appeal dismissed.

[SUPREME COURT.]

*V. Ramaswami,
V. Bhargava and
Raghubar Dayal, JJ.*
22nd September, 1966.

*Jamuna Singh v.
State of Bihar.*
Cr.A. No. 238 of 1964.

Penal Code (XLV of 1860), sections 115, 333 and 436 read with section 109.

It is only in the case of a person abetting an offence by intentionally aiding another to commit that offence that the charge of abetment against him would be expected to fail when the person alleged to have committed the offence is acquitted of that offence. The case of *Faguna Kanta Nath*, (1959) Supp. 2 S.C.R. 1, 5, lays this down. The observations of this Court in that case, at page 7, bring out clearly the distinction in the case of persons instigating another or engaging in conspiracy with another on the one hand and that of a person aiding the person in committing a certain offence.

In the present case, there is no finding of the Court below and it cannot be said that the fire was set by any person who was participating in the incident along with Jamuna Singh and at his instigation. Three alleged co-accused have been acquitted and therefore cannot be said to have taken part in the incident. Jodha Singh and Jamuna Singh took part in the incident according to the findings of the Court below and Jodha Singh did not set fire to the hut. It follows that it cannot

be held that Baishaki's hut was set fire to by any one at the instigation of Jamuna Singh.

The result is that Jamuna Singh's conviction under section 436 read with section 109, Indian Penal Code, is not correct in law.

D. P. Singh, Advocate of *M/s. Ramamurthi & Co.*, for Appellant.

G.R.

Appeal partly allowed.

[SUPREME COURT.]

K. N. Wanchoo,
J. M. Shelat and
G. K. Mitter, JJ.
23rd September, 1966.

Raghubans Narain Singh v.
The Uttar Pradesh Government.
C.A. No. 82 of 1964.

Land Acquisition Act (I of 1894), section 4—Payment of Market Value under section 23—Method of calculating valuation.

Market value on the basis of which compensation is payable under section 23 of the Land Acquisition Act means the price that a willing purchaser would pay to a willing seller for a property having due regard to its existing condition, with all its existing advantages, and its potential possibilities when laid out in its most advantageous manner, excluding any advantage due to the carrying out of the scheme for the purposes for which the property is compulsorily acquired. As observed in *South Eastern Rail Co. v. L.C.C.*, (1915) 2 Ch. 252.

"Such a method of valuation is not adequate at least for two reasons: (1) that the owner may not have so far put his property to its best use or in the most lucrative manner and (2) in a case like the present the grove had not yet started giving the maximum yield." Such a method of valuation by ascertaining the annual value of the produce can and should be resorted to only when no other alternative method is available. We are of the view that the District Judge was right in accepting the evidence of Zaidi and in treating his offer as one of a willing prospective purchaser. The valuation made by the District Judge on that evidence rested on a better footing in the circumstances of the case and ought to have been accepted by the High Court.

With regard to the payment of interest the Court held:—The contention, so put forward resolves itself into two questions: (1) whether in the absence of a specific objection as to interest in the appellant's cross-objections the High Court ought to have gone into that question and (2) whether on a proper interpretation of section 28 the Court has a discretion to grant interest at a rate less than 6 per cent. The first point would not create any difficulty in the way of the appellant because the High Court did in fact go into the question of interest even though it was not specifically taken in the cross-objections and decided the question on interpretation of section 28. Besides, the question is purely one of law.

B. C. Misra, Senior Advocate, (*M. V. Goswami*, Advocate, with him), for Appellant.

N. D. Karkhanis, Senior Advocate (*O. P. Rana*, Advocate, with him), for Respondent.

G.R.

Appeal allowed.

[SUPREME COURT.]

V. Ramaswami,
V. Bhargava and
Raghubar Dayal, JJ.
26th September, 1966.

Krishnamurthy *alias* Tailor Krishnan v.
Public Prosecutor, Madras.
Cr. A. No. 251 of 1964.

Suppression of Immoral Traffic in Women and Girls Act (CIV of 1956), section 3 (1)—‘Kept as a brothel’ meaning of.

It has been urged, however, that a solitary instance of the house of the appellant being used for the purpose of prostitution will not suffice for establishing that the house was being ‘kept as a brothel.’ It may be true that a place used once for the purpose of prostitution may not be a brothel, but it is a question of fact as to what conclusion should be drawn about the use of a place about which information had been received that it was being used as a brothel, to which a person goes and freely asks for girls, where the person is shown girls to select from and where he does engage a girl for the purpose of prostitution. The conclusion to be derived from these circumstances about the place and the person ‘keeping it’ can be nothing else than that the place was being used as a brothel and the person in charge was so keeping it. It is not necessary that there should be evidence of repeated visits by persons to the place for the purpose of prostitution. A single instance coupled with the surrounding circumstances is sufficient to establish both that the place was being used as a brothel and that the person alleged was so keeping it.

We are of opinion that the facts found in the present case justify the conclusion that the appellant was keeping a brothel at his house. The appellant’s conviction under section 3 (1) of the Act is therefore correct.

R. Thiagarajan and A. V. V. Nair, Advocates, for Appellant.

Bishan Narain, Senior Advocate (A. V. Rangam, Advocate, with him), for Respondent.

G. R.

Appeal dismissed.

[SUPREME COURT.]

V. Ramaswami,
V. Bhargava and
Raghubar Dayal, JJ.
27th September, 1966.

Srichand K. Khetwani v.
State of Maharashtra.
Cr.A. No. 184 of 1964.

Penal Code (XLV of 1860), section 120-B read with section 109, and section 5 (2) read with section 5 (1) (d) of the Prevention of Corruption Act—Section 342, Criminal Procedure Code, section 114, Evidence Act.

The finding that the various firms to whom licences were issued were fictitious is not questioned. The conspiracy was a general conspiracy to keep on issuing licences in the names of fictitious firms and to share the benefits arising out of those licences when no real independent person was the licensee. The various members of the conspiracy other than the two public servants must have joined with the full knowledge of the *modus operandi* of the conspiracy and with the intention and object of sharing the profits arising out of the acts of the conspirators. We do not therefore see that the mere fact that licences were issued in the names of eight different companies make out the case against the appellant and the other conspirators to be a case of eight different conspiracies each with respect to the licences issued to one particular fictitious company.

Further, an adverse inference against the prosecution can be drawn only if it withholds certain evidence and not merely on account of its failure to obtain certain evidence. When no such evidence has been obtained, it cannot be said that that evidence would have been and therefore no question of presuming that that evidence

would have been against the prosecution, under section 114, *Illustration (g)* of the Evidence Act, can arise.

R. Jethmalani and P. Kapila Hingorani, Advocates, for Appellant.

O.P. Rana and B. R. G. K. Achar, Advocates, for Respondent.

G. R.

Appeal dismissed.

[SUPREME COURT.]

K. Subba Rao, C.J.,
M. Hidayatullah, S. M. Sikri,
R. S. Bachawat and
Raghubar Dayal, JJ.
3rd October, 1966.

State of Assam v.
Kanak Chandra Dutta.
C.A. No. 254 of 1964.

Constitution of India (1950), Article 311 (2)—Whether a Mauzadar in the Assam Valley holds a civil post.

In the context of Articles 309, 310 and 311, a post denotes an office. A person who holds a civil post under a State holds "office" during the pleasure of the Governor of the State, except as expressly provided by the Constitution, see Article 310. A post under the State is an office or a position to which duties in connection with the affairs of the State are attached, an office or a position to which a person is appointed and which may exist apart from and independently of the holder of the post. Article 310 (2) contemplates that a post may be abolished and a person holding a post may be required to vacate the post, and it emphasises the idea of a post existing apart from the holder of the post. A post may be created before the appointment or simultaneously with it. A post is an employment, but every employment is not a post. A casual labourer is not the holder of a post. A post under the State means a post under the administrative control of the State. The State may create or abolish the post and may regulate the conditions of service of persons appointed to the post.

Judged in this light, a Mauzadar in the Assam Valley is the holder of a civil post under the State. The State has the power and the right to select and appoint a Mauzadar and the power to suspend and dismiss him. He is a subordinate public servant working under the supervision and control of the Deputy Commissioner. He receives by way of remuneration a commission on his collections and sometimes a salary. There is a relationship of master and servant between the State and him. He holds an office on the revenue side of the administration to which specific and onerous duties in connection with the affairs of the State are attached, an office which falls vacant on the death or removal of the incumbent and which is filled up by successive appointments. He is a responsible officer exercising delegated powers of Government. Mauzadars in the Assam Valley are appointed Revenue Officers and ex-officio Assistant Settlement Officers. Originally, a Mauzadar may have been a revenue farmer and an independent contractor. But having regard to the existing system of his recruitment, employment and functions, he is a servant and a holder of a civil post under the State.

S. V. Gupta, Solicitor-General of India (*Naunit Lal*, Advocate, with him), for Appellant.

K. R. Chaudhuri, Advocate, for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT.]

K. N. Wanchoo,
J. M. Shelat and
G. K. Mitter, JJ.
5th October, 1966.

Shyam Sunder v.
Satya Ketu.
C.A. No. 204 of 1966.

Representation of People Act (XLIII of 1951) sections 98 and 116-A—Conduct of election Rules, 1961, rule 73—Maintainability of the appeal before the High Court—Code of Civil Procedure.

We are of opinion that in view of the provisions of the Act it is unnecessary to prepare a decree after the conclusion of the trial of an election petition; section 90 (1) would not make those provisions of the Code of Civil Procedure which require the preparation of a decree applicable to the trial of an election petition, for the Code of Civil Procedure has to be applied to such trial as nearly as may be and subject to the provisions of the Act. Further we have no doubt that preparation of a decree is not necessary after the conclusion of the trial of an election petition.

Let us then turn to section 116-A of the Act to see if there is anything in that section which requires the filing of a decree along with copy of the judgment of the tribunal. Section 116-A *inter alia* provides for appeals against orders made by the tribunal, under section 98. We have already referred to the fact that section 98 does not speak of a decree. Section 116-A provides for an appeal not from a decree of the tribunal but from an order passed by it *inter alia* under section 98. It is true same procedure with respect to such an appeal is provided as if the appeal were an appeal from an original decree passed by a civil Court. But that in our opinion does not mean that a copy of decree is necessary before an appeal under section 116-A is maintainable, for the simple reason that the scheme of the Act shows that no decree is necessary to be prepared by the tribunal at all and the appeal under section 116-A (1) is also from an order and not from a decree. In this connection we may refer to section 96 of the Code of Civil Procedure which provides for an appeal from an original decree. That section *inter alia* provides that an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decisions of such Court. It will be seen that section 96 of the Code of Civil Procedure provides for appeal from a decree in a suit, and that is why it is necessary to prepare a decree, the same is also provided in section 33 of the Code of Civil Procedure which in terms lays down that "the Court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow". We have no corresponding words in sections 98 and 116-A of the Act, and that shows that it is not necessary to prepare a decree at the conclusion of the trial of an election petition and in consequence no copy of decree is necessary to be filed when an appeal is filed under section 116-A of the Act.

G. N. Dikshit, Advocate, for Appellant.

R. K. Garg and S. G. Agarwal, Advocates of M/s. Ramamurthi & Co., for Respondent No. 1.

G.R.

Appeal dismissed.

[SUPREME COURT.]

*M. Hidayatullah and**V. Bhargava, J.J.*

23rd November, 1966.

Municipal Corporation of Delhi.

Ghisa Ram

Cr.A. No. 194 of 1966

Prevention of Food Adulteration Act (XXXVII of 1954), sections 7, 13 (2) and 16—Scope.

It appears to us that when a valuable right is conferred by section 13 (2) of the Prevention of Food Adulteration Act on the vendor to have the sample sent to him analysed by the Director of the Central Food Laboratory, it is to be understood that the prosecution will proceed in such a manner that that right will not be denied to him. The right is a valuable one, because the certificate of the Director supersedes the report of the Public Analyst and is treated as conclusive evidence of its contents. Obviously, the right has been given to the vendor in order that, for his satisfaction and proper defence, he should be able to have the sample kept in his charge analysed by a greater expert whose certificate is to be accepted by Court as conclusive evidence. In a case where there is denial of this right on account of the deliberate conduct, of the prosecution, we think that the vendor, in his trial, is so seriously prejudiced that it would not be proper to uphold his conviction on the basis of the report of the Public Analyst, even though that report continues to be evidence in the case of the facts contained therein.

This is therefore, clearly a case where the respondent was deprived of the opportunity of exercising his right to have his sample examined by the Director of the Central Food Laboratory by the conduct of the prosecution. In such a case, we think that the respondent is entitled to claim that his conviction is vitiated by this circumstance of denial of this valuable right guaranteed by the Act, as a result of the conduct of the prosecution.

The reason why the conviction cannot be sustained is that the accused is prejudiced in his defence and is denied a valuable right of defending himself solely due to the deliberate acts of the prosecution.

H. R. Gokhale, Senior Advocate (*K. K. Raizada* and *A. G. Ramnarkhi*, Advocates, with him), for Appellant.

Frank Anthony, Ghanshyam Dass, Jitendra Sharma and *V. P. Chaudhury*, Advocates, for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT.]

*K.N. Wanchoo, R.S. Bachawat and**J. M. Shelat, J.J.*

29th November, 1966.

*Kumara Nand v.**Brijmohan Lal Sharma.*

C.A.No. 2135 of 1966.

Representation of the People Act (XLIII of 1951), section 123 (4)—Onus of proof—Meaning of words "Statement of fact".

It is however urged on behalf of the appellant that there are no details as to the time when the respondent committed thefts or the place where he committed them, and therefore a mere bald statement that the respondent was a thief or the greatest of all thieves could be an expression of opinion only and not a statement of fact. We are unable to accept this. Section 123 (4) in our opinion does not require that when a statement of fact is made as to the personal character or conduct of a candidate details which one generally finds (for example) in a charge in a criminal case, must also be there and that in the absence of such details a statement to the effect that a person is (for example) a thief or murderer is a mere expression of opinion. To say that a person is a thief or murderer is a statement of fact and the mere absence of details as to time and place would not turn a statement of fact of this nature into a mere expression of opinion.

The burden of proving that the candidate publishing the statement believed to be false or did not believe it to be true though on the complaining candidate is very light and would be discharged by the complaining candidate swearing to that effect. Thereafter it would be for the candidate publishing the statement to prove otherwise. The question whether the statement was reasonably calculated to prejudice the prospects of the election of the candidate against whom it was made would generally be a matter of inference. So the main onus on an election petitioner under section 123 (4) is to show that a statement of fact was published by a candidate or his agent or by any other person with the consent of the candidate or his election agent and also to show that that statement was false and related to his personal character or conduct. Once that is proved and the complaining candidate has sworn as above indicated, the burden shifts to the candidate making the false statement of fact to show what his belief was. The further question as to prejudice to the prospects of election is generally a matter of inference to be arrived at by the tribunal on the facts and circumstances of each case.

In the present case the main onus that lay on the respondent has been discharged. He has proved that there was a publication of the nature envisaged under section 123 (4) of the Act. He has also proved that the statement of fact was made with respect to him. He has further proved that that statement was false and related to his personal character or conduct. There can be no doubt that a statement of this nature calling one candidate a thief or the greatest of all thieves, is reasonably calculated to prejudice the prospects of his election. He further swore that the statement was false to the knowledge of the appellant and the latter did not believe it to be true. It was then for the appellant to show what his belief was. The burden having thus shifted we are of opinion that it was for the appellant to show either that the statement was true or that he believed it to be true. That the appellant has failed to do. The High Court therefore rightly held that the respondent had discharged the burden which lay on him.

R. K. Garg, D.P. Singh and S. C. Agarwala, Advocates of M/s. Ramamurthy & Co., for Appellant.

B. D. Sharma and L. D. Sharma, Advocates, for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT.]

K. Subba Rao, C. J.

M. Hidayatullah,

S. M. Sikri,

R. S. Bachawat and

J. M. Shelat, JJ.

2nd December, 1966.

Ajit Singh v.

State of Punjab.

C.A. No. 1018 of 1966 and

Bhagat Ram v.

State of Punjab.

W.P. No. 125 of 1966.

East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (L of 1948), sections 14 (1) and (2), 19, 20 of the Act—Articles 31-A, 12 of the Constitution.

By Majority :

It seems to us that there is this essential difference between "acquisition by the State" on the one hand and "modification or extinguishment of rights" on the other that in the first case the beneficiary is the State while in the latter case the beneficiary of the modification or the extinguishment is not the State. For example, suppose the State is the landlord of an estate and there is a lease of that property and law provides for the extinguishment of leases held in an estate. In one sense it would be an extinguishment of the rights of a lessee, but it would properly fall under the category of acquisition by the State because the beneficiary of the extinguishment would be the State.

Coming now to the second proviso to Article 31-A, it would be noticed that only one category is mentioned in the proviso, the category being "acquisition by the State of an estate." It means that the law must make a provision for the acquisition by the State of an estate. But what is the true meaning of the expression "acquisition by the State of an estate?" In the context of Article 31-A, the expression "acquisition by the State of an estate" in the second proviso to Article 31-A (1) must have the same meaning as it has in clause (1) (a) to Article 31-A.

Let us now see whether the other part of the second proviso throws any light on this question. It would be noticed that it refers to ceiling limits. It is well-known that under various laws dealing with land reforms, no person apart from certain exceptions can hold land beyond a ceiling fixed under the law. Secondly, the proviso says that not only the land exempted from acquisition should be within the ceiling limit but it also must be under personal cultivation. The underlying idea of this proviso seems to be that a person who is cultivating land personally, which is his source of livelihood, should not be deprived of that land under any law protected by Article 31-A unless at least compensation at the market rate is given. In various States most of the persons have already been deprived of land beyond the ceiling limit on compensation which was less than the market value. It seems to us that in the light of all the considerations mentioned above the words "acquisition by the State" in the second proviso do not have a technical meaning, as contended by the learned Counsel for the respondent. If the State has in substance acquired all the rights in the land for its own purposes, even if the title remains with the owner, it cannot be said that it is not acquisition within the second proviso to Article 31-A.

In the context of the second proviso, which is trying to preserve the rights of a person holding land under his personal cultivation, it is impossible to conceive that such adjustment of the rights of persons holding land under their personal cultivation in the interest of village economy was regarded as something to be compensated for in cash.

Here it seems to us that the beneficiary is the Panchayat which falls within the definition of the word "State" under Article 12 of the Constitution. The income derived by the Panchayat is in no way different from its any other income.

Therefore, the income can only be used for the benefit of the village community. But so is any other income of the Panchayat of a village to be used. The income is the income of the Panchayat and it would defeat the whole object of the second proviso if we were to give any other construction. The Consolidation Officer could easily defeat the object of the second proviso to Article 31-A by reserving for the income of the Panchayat a major portion of the land belonging to a person holding land within the ceiling limit. Therefore, in our opinion, the reservation of 100 kanals 2 marlas for the income of the Panchayat in the scheme is contrary to the second proviso and the scheme must be modified by the competent authority accordingly.

In the result we hold that the scheme is hit by the second proviso to Article 31-A in so far as it reserves 100 kanals 2 marlas for the income of the Panchayat. We direct the State to modify the scheme to bring it into accord with the second proviso as interpreted by us, and proceed according to law.

B. R. L. Iyengar, Senior Advocate (*S. K. Mehta* and *K. L. Mehta*, Advocates, with him), for Appellant in C.A. No. 1018 of 1966.

Hardev Singh and *S. S. Khanduja*, Advocates, for Petitioner in W.P. No. 125 of 1966.

K. L. Gossain, Senior Advocate, (*O. P. Malhotra* and *R. N. Sachthey*, Advocates, with him), for Respondents in C.A. No. 1018 of 1966 and W.P. No. 125 of 1966.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT :—J. C. SHAH, V. RAMASWAMI AND V. BHARGAVA JJ.

M/s. O. RM. M. SP. SV. Firm

.. Appellant*

v.

Commissioner of Income-tax, Madras

.. Respondent.

Income-tax Act (IX of 1922), section 25—Discontinuance—Business charged to tax under the 1918 Act—Exemption—Assessee, firm—Business in India and outside India—Profits of foreign business—Receipt—Taxed under the 1918 Act—Dissolution of firm—Foreign business and rental income from houses owned by foreign firm—Relief on discontinuance—Allowable.—Receipt of income derived from foreign business—Charge under the 1918 Act—Amounts to assessment on foreign business—Business, profession or vocation—Not a unit of assessment—Charge on the owner of the business—Exemption on discontinuance—General—Not restricted to the head “profits and gain of business”—Division into various heads only for computation—Rental income from property owned by foreign firm—Relief on discontinuance—Tenable.

A Hindu undivided family, carrying on business in money-lending in India and outside India, was assessed under the 1918 Act in respect of the receipt of the profits of the foreign business. On a partition and constitution of a partnership (the assessee) between the divided members of the family in the year 1938, a claim was made in the assessment year 1939-40 under section 25 (3) and (4) of Act of 1922 in respect of the period from 13th April, 1938 to 2nd June, 1938. In reference the High Court rejected the claim on the basis that there was no discontinuance of the business but only succession. On the dissolution of the assessee-firm on 2nd March, 1952, a claim for relief under section 25 (3) was made for the assessment year 1952-53, in respect of the income from foreign business and the rental income from house properties owned by the foreign firm. The High Court in reference held that as the foreign business cannot be deemed to have been charged under 1918 Act because the assessee was only taxed on remittances received from the profits of the foreign business, section 25 (3) was not attracted. The assessee appealed.

Held, that the assessee is entitled to both the parts of the relief contemplated under section 25 (3) of the Act in respect of the foreign business and is also entitled to relief under section 25 (3) with regard to rental income from house properties owned by the foreign firm which was discontinued in the year of assessment.

Where the entire income of the foreign business was remitted to the assessee and tax imposed on that income under the 1918 Act, the foreign business of the assessee must be held to be charged under the provisions of 1918 Act within the meaning of section 25 (3) of Act of 1922. It is manifest that by section 3 of the 1918 Act the charge was made on the receipt of income in British India and as the income received by the assessee was derived from the foreign business and was in relation to the foreign business it must be taken that there was an assessment to tax on the foreign business within the meaning of section 25 (3) of the Act of 1922.

Tax is charged under the Income-tax Acts on specific units such as, individuals, Hindu undivided family, companies, local authorities, firms and association of persons, etc., and business, profession or vocation is not a unit of assessment. When, therefore, section 25 (3) enacts that tax was charged at any time on any business, it is intended that the tax was at any time charged on the owner of the business. If that condition be fulfilled in respect of the income of business under 1918 Act, the owner or his successor-in-interest in relation to the business will be entitled to get the benefit of the exemption under it if the business is discontinued.

The exemption under section 25 (3) is general and there is no reason to restrict the condition of the applicability only to income on which the tax was payable under the head “profits, and gains of business, profession or vocation.” The heads of income described in section 6 of the 1922 Act and further elaborated for the purpose of computation in sections, 7 to 10 and 12, 12-A, 12-AA and 12-B are intended merely to indicate the classes of income. The heads do not exhaustively delimit sources from which income arises. Business income is broken up under different heads only for the purpose of computation of total income. By that breaking up the income does not cease to be

the income of the business. The assessee is entitled to relief with regard to the rental income from the house properties owned by the foreign firm which was discontinued.

Appeal from the Judgment and Order dated the 18th December, 1962, of the Madras High Court in Tax Case No. 143 of 1960.¹

A. K. Sen, Senior Advocate (*K. Parasaran*, *K. Rajinder Chaudhuri* and *K. R. Chaudhuri*, Advocates, with him), for Appellant.

B. Sen, Senior Advocate, (*T. A. Ramachandran*, Advocate, and *S. P. Nayar*, Advocate, for *R. N. Sachthey*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Ramaswami, J.—This appeal is brought by certificate against the judgment of the Madras High Court dated 18th December, 1962 in T.C. No. 143 of 1960¹.

The appellant (hereinafter called the "assessee") was a firm called O. R. M. M. SP. SV. Firm which was registered under section 26-A of the Income-tax Act, 1922, (hereinafter called the "1922 Act"). Prior to the constitution of the firm, the partners were members of a Hindu undivided family. The family which consisted of Meyyappa Chettiar and his two brothers carried on money-lending business in India and in the former Federated Malaya States and it was assessed under the Indian Income-tax Act, 1918 (hereinafter called the "1918 Act"). There was a disruption of the joint family status on 2nd June, 1938, and thereafter the members of the family continued the business as partners. In the course of the assessment for the year 1939-40 it was claimed by Meyyappa Chettiar, one of the members of the family that having regard to the severance of joint family status, the income of the family, from 13th April, 1938 to 2nd June, 1938, was not liable to be taxed by reason of the provisions of section 25 (3) and (4). The Income-tax Officer accepted the fact of partition amongst the members for the family, but rejected the contention that the family was not liable to pay tax on the profits of the said period. The High Court ultimately called for a reference on the following question :

"Whether the income of the family from 13th April, 1938 to 2nd June, 1938 is not liable to be taxed by virtue of section 25 (3) of the Indian Income-tax Act."

After receipt of the reference the High Court held that there was no discontinuance of the business within the meaning of section 25 (3). The view taken by the High Court was that when a Hindu undivided family carrying on a business, which was taxed under the 1918 Act, became disrupted and the members continued the business thereafter as partners, there could be no discontinuance but only succession by the firm of the business of the family. It was held in that case that it was the assessee-firm which took over the business of the Hindu undivided family. The firm was dissolved on 2nd March, 1952. In the assessment for the year 1952-53 the assessee applied for relief under section 25 (3) of the 1922 Act. The claim was rejected by the Income-tax Officer on 7th March, 1956. The assessee preferred an appeal to the Appellate Assistant Commissioner who dismissed the appeal holding that in the case of business carried on in foreign territory the business as such is not assessed under section 3 of the 1918 Act but only receipt of the income in British India is assessed and it cannot therefore be held that the foreign business of the appellant was charged to tax under the 1918 Act. The assessee took the matter in further appeal to the Appellate Tribunal which considered that the assessee was entitled to relief under section 25 (3) of the 1922 Act except for the income received from the house properties in Malaya. The Appellate Tribunal accordingly allowed the appeal of the assessee in part. Both the assessee and the Department applied to the Appellate Tribunal for reference of the questions of law to the High Court. The Appellate Tribunal allowed the applications and stated a case to the High Court on the following questions of law :

"(i) Whether the assessee is entitled to both the parts of the relief contemplated under section 25 (3) of the Act in respect of foreign business at Penang, Ipoh and Kambar ?

(ii) Whether the applicant is also entitled to relief under section 25 (3) of the Act with regard to rental income from house properties owned by the foreign firm which was discontinued in the year of assessment."

The Appellate Tribunal also referred another question for the opinion of the High Court but it is not the subject-matter of the present appeal.

The High Court, held that the assessee was not entitled to relief under section 25 (3) of the 1922 Act and accordingly answered both the questions in favour of the Department. The view taken by the High Court was that the foreign business of the assessee cannot be deemed to have been charged under the provisions of the 1918 Act because the assessee was only taxed on remittances received from the profits of the foreign business and there was no tax on the foreign business itself under the 1918 Act. The High Court accordingly reached the conclusion that the assessee was not entitled to relief under section 25 (3) of the 1922 Act.

Section 25 (3) of the 1922 Act is to the following effect :

" 25. (3) Where any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918 (VII of 1918), is discontinued, then, unless there has been a succession by virtue of which the provisions of sub-section (4) have been rendered applicable no tax shall be payable in respect of the income, profits and gains of the period between the end of the previous year and the date of such discontinuance, and the assessee may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period. Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period, and if an amount of tax has already been paid in respect of the income, profits and gains of the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference."

Under this section exemption from liability to pay tax in respect of the income, profits and gains may be claimed by an assessee if the business is one in respect of which tax was charged at any time under the 1918 Act, and the business is discontinued—there being no succession by virtue of which the provisions of sub-section (4) of section 25 have been rendered applicable. Section 25 (3), however, applies even if the person assessed under the 1918 Act was different from the person who claims relief under that section provided the former was the predecessor-in-interest of such person in relation to the business. The reason for enacting section 25 (3) was that under the 1918 Act, income-tax was levied by virtue of section 14 (2) of the 1918 Act, on the income of the year of assessment. Tax was, therefore, levied in the financial year 1921-22 on the income of that year. By the 1922 Act the basis of taxation was altered and by section 3 of that Act, charge for tax was imposed upon the income of the previous year. When the 1922 Act was brought into force on 1st April, 1922, two assessments in respect of the same income for the year 1921-22 had to be made. The income for 1921-22 was accordingly charged to tax twice; it was charged under the 1918 Act and it was also charged to tax under section 3 of the 1922 Act read with the appropriate Finance Act, resulting in double taxation in respect of the income for that year. But with a view to make the number of assessments equal to the number of years during which the business was carried on the Legislature enacted the exemption prescribed by section 25 (3). This benefit was however restricted only to the income, profits and gains of business, profession or vocation on which tax had been charged under the provisions of the 1918 Act. By enacting section 25 (3) the Legislature intended to exempt the income, profits and gains resulting from the activity styled business, profession or vocation from tax when the business, profession or vocation is discontinued if tax was charged in respect thereof under the 1918 Act.

The first question to be considered in this appeal is whether the assessee is entitled to both parts of relief contemplated under section 25 (3) of the 1922 Act in respect of the foreign business at Penang, Ipoh and Kambur. The controversy between the parties turns on the question whether the foreign business of the assessee was at any time charged under the provisions of the 1918 Act. It has been found by the Appellate Tribunal that the assessee was taxed on remittances received from and out of the profits of the foreign business. The finding of the Appellate Assistant Commissioner is stated in these terms :

"The entire profits of the foreign business came to be assessed in the hands of the appellant under the 1918 Act, not because it was a business income but because such income had been remitted into British India. Therefore, in fact also it is not the foreign profits of a business that has been charged to tax but only the remittance which in the particular case was not less than the profits of the year."

We have therefore to proceed on the footing that the assessee received the entire profits of the foreign business in British India and the entire profits were assessed to income-tax in the hands of the assessee under the 1918 Act. It is necessary, at this stage, to set out the relevant provisions of the 1918 Act.

Section 3, the charging section stated as follows:

"3 (1) Save as hereinafter provided, this Act shall apply to all income from whatever source it is derived, if it accrues or arises or is received in British India, or is, under the provisions of this Act, deemed to accrue or arise or to be received in British India."

Section 5 mentioned the classes of income chargeable to income-tax and reads as follows:

"5. Save as otherwise provided by this Act, the following classes of income shall be chargeable to income-tax in the manner hereinafter appearing, namely—

- (i) Salaries.
- (ii) Interest on securities.
- (iii) Income derived from house property.
- (iv) Income derived from business.
- (v) Professional earnings.
- (vi) Income derived from other sources".

Section 9 of the 1918 Act enumerated the permissible deductions in the computation of the profits of the business. The question for determination is whether the foreign business of the assessee was at any time charged under the provisions of section 3 of the 1918 Act. It has been found in this case that the entire income of the foreign business was remitted to the assessee and tax imposed on that income under the 1918 Act. We are of the opinion that in the context of these two facts the foreign business of the assessee must be held to be charged under the provisions of the 1918 Act within the meaning of section 25 (3) of the 1922 Act. It is manifest that by section 3 of the 1918 Act the charge was made on the receipt of income in British India and as the income received by the assessee was derived from the foreign business and was in relation to the foreign business it must be taken that there was an assessment to tax on the foreign business within the meaning of section 25 (3) of the 1922 Act. In other words, the tax under the 1918 Act was charged upon the assessee in respect of his activity styled "foreign business" and in relation to it and it must be hence taken, upon the facts found by the Appellate Tribunal in this case, that the foreign business of the assessee was charged under the 1918 Act within the meaning of section 25 (3) of the 1922 Act. The High Court has taken the view that the foreign business of the assessee was not charged under the 1918 Act because what was taxed was the remittances received by the assessee from the foreign business and not the foreign business itself. In taking this view, the High Court has followed its previous decision in *Commissioner of Income-tax, Madras v. S.V.R.M. Palaniappa Chettiar & others*¹ in which it was held that the words "on which" in section 25 (4) of the 1922 Act cannot be interpreted as meaning "with reference to which" and that in order to claim and avail the benefit under section 25 (4) the tax clearly should be charged on the business as such under the 1918 Act. At page 173 of the report, Satyanarayana, Rao, J., stated as follows:—

"The relief under sub-clause (4) is permissible only if the tax on the business was charged under the provisions of the Indian Income-tax Act, 1918. If the foreign business at Muzar was not and could not have been charged under the Act and the share in the profits of the family from that foreign business was charged under section 3 only on the receipt in British India, can it be said that the charge so made was a charge of a tax on the foreign business. The income received by the joint family could not have been charged under the head 'income derived from business' but only as a receipt under section 3. The argument, however, on behalf of the assessee by his learned Advocate Mr. Rajah Iyer was that the words 'on which tax was at any time charged' should be construed as meaning 'with reference to which tax was at any time charged.' In other words, the contention is that the income derived by the assessee was in relation to a business and therefore the assessment of the income must be treated as an assessment of the business. No doubt, under the provisions of the Income-tax Act, the tax is payable by an assessee but the assessment of the tax is on the basis of various heads of income derived by the assessee one of which is business. It cannot, therefore,

1. (1951) 2 M.L.J. 202 : I.L.R. (1952) Mad. 211; 30 I.T.R. 170 (173).

be said that because tax was payable by the assessee on the profits received from a business in a foreign territory such assessment is an assessment of the business."

In our opinion, the view adopted by the High Court in *Commissioner of Income-tax, Madras v. S.V.R.M. Palaniappa Chettiar & others*¹ must be taken to be impliedly overruled by the recent decision of this Court in *Commissioner of Income-tax, Bombay City I v. Chugandas & Co.*² in which the question was whether the interest on securities formed part of the assessee's business income for the purpose of the exemption from tax under section 25 (3) of the 1922 Act. It was held by this Court that the assessee was entitled to exemption under section 25 (3) in respect of interest on securities as well, and there was no reason to restrict the condition of the applicability of the exemption under section 25 (3) only to income on which the tax was payable under the head "Profits and gains of business, profession or vocation." It was further observed in that case that tax is charged under the Income-tax Acts on specific units, such as, individuals, Hindu undivided families, companies, local authorities, firms and associations of persons, etc., and business, profession or vocation is not a unit of assessment. When, therefore, section 25 (3) enacts that tax was charged at any time on any business, it is intended that the tax was at any time charged on the owner of any business. If that condition be fulfilled in respect of the income of the business under the 1918 Act, the owner or his successor-in-interest in relation to the business, will be entitled to get the benefit of the exemption under it if the business is discontinued. We are accordingly of the opinion that the High Court was in error in holding that the foreign business of the assessee was not charged under the provisions of the 1918 Act. The first question must therefore be answered in favour of the assessee and it must be held that the assessee is entitled to both parts of relief contemplated under section 25 (3) of the 1922 Act in respect of the foreign businesses at Penang, Ipoh and Kambar.

The second question of law arising in this appeal is whether the assessee was entitled to relief under section 25 (3) of the 1922 Act with regard to the rental income from house properties owned by the foreign firm which was discontinued in the year of account. A similar question was the subject-matter of consideration in *Commissioner of Income-tax, Bombay City I v. Chugandas & Co.*² which has already been referred to. In that case, the assessee-firm, a dealer in securities holding securities as its stock-in-trade, had been charged to tax under the 1918 Act, in respect of business. It received Rs. 4,13,992 and Rs. 1,01,229 as interest on securities in the years 1946 and 1947 respectively. The firm discontinued its business on 30th June, 1947. The question at issue was whether the interest on securities formed part of the assessee's business income for the purpose of the exemption from tax under section 25 (3) of the 1922 Act. It was held by this Court that the assessee was entitled to exemption under section 25 (3) in respect of interest on securities as well. It was pointed out that there was no reason to restrict the condition of the applicability of the exemption under section 25 (3) only to income on which the tax was payable under the head "profits and gains of business, profession or vocation." The exemption under section 25 (3) is general. It was explained by this Court that the heads of income described in section 6 of the 1922 Act, and further elaborated for the purposes of computation in sections 7 to 10 and 12, 12-A, 12-AA and 12-B, are intended merely to indicate the classes of income. The heads do not exhaustively delimit sources from which income arises. Business income is broken up under different heads only for the purpose of computation of the total income. By that breaking up the income does not cease to be the income of the business, the different heads of income being only the classification prescribed by the Income-tax Act for computation. The ratio of this decision applies to the present case and it must accordingly be held that the assessee is entitled to relief under section 25 (3) of the 1922 Act with regard to the rental income from the house properties owned by the foreign firm which was discontinued in the year of account.

1. (1951) 2 M.L.J. 202 : I.L.R. (1952) Mad. 491. 2. (1964) 2 I.T.J. 781 : (1965) 1 S.C.J. 491.

For these reasons the judgment of the Madras High Court is set aside and this appeal must be allowed with costs.

V.S.

Appeal allowed.

THE SUPREME COURT OF INDIA.
(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HADAYA TULLAH, J. C. SHAH AND S. M. SIKRI, JJ.

The State of Mysore (In all the Appeals)

Appellant*

v.

Padmanabhacharya and others

Respondents.

Mysore Service Regulations as amended on 29th April, 1955, Rule 294 (a) note 4—Construction—Trained teachers in the Education Department—Age of retirement.

Constitution of India (1950), Article 309, Proviso—Scope—Notification, dated 25th March, 1959 made by Mysore Governor under—Validity.

Under rule 294 (a) of the Mysore Service Regulations as it was before 29th April, 1955 the normal age of retirement was 55 years for all Government servants including trained teachers and it was for the Government to give extension on the ground of fitness. But after Note 4 was added to rule 294 (a) on 29th April, 1955 the position with respect to trained teachers was changed and trained teachers were normally entitled to continue in service till the age of 58 years unless the Director of Public Instruction or the Government, as the case may be, was of the opinion that they had not a good record of service and were not upto the mark. Therefore after the change made on 29th April, 1955 trained teachers could only be retired at the age of 55 years if the Director of Public Instruction or the Government, as the case may be, came to the conclusion that they had not a good record of service and were not upto the mark. Therefore before trained teachers in the Education Department could be retired at the age of 55 years, the Director of Public Instruction or the Government had to come to the conclusion that they had not a good record of service and were not upto the mark. If such a conclusion was not arrived at, they would be entitled to under Note 4 to rule 294 (a) to continue in service upto the age of 58 years.

The presence of the word "generally" in the first part of Note 4 to rule 294 (a) does not mean that the normal age of retirement of trained teachers is still 55 years. The reason why the word "generally" is used in the earlier part of Note 4 is to be found in the latter part of the same note where power has been given to retire trained teachers at the age of 55 years, if they have not a good record of service and are not upto the mark:

Under the proviso to Article 309 of the Constitution of India (1950) the Governor has the power to make rules regulating the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the State. The notification dated March 25, 1959 made by the Governor of Mysore under the proviso to Article 309 provided that notwithstanding anything contained in Note 4 to rule 294 of the Mysore Service Regulations, Government servants who had been retired from service on the attainment of the age of fifty-five during the period between 7th June, 1957 and 28th October, 1958 shall be deemed to have been validly retired. This notification cannot be said to be a rule regulating the recruitment and conditions of service of persons appointed to services and posts in connection with the affairs of the State. All that the rule does is to say in so many words that certain persons who had been invalidly retired should be deemed to have been validly retired from service on superannuation. It would, if given effect, contravene Article 311 of the Constitution of India. Such a rule is not a rule contemplated under the proviso to Article 309. The power of validating an order which was invalid when it was made does not follow from the power conferred on the Governor to make Rules regulating recruitment and conditions of service of persons appointed to services and posts in connection with the affairs of the state. It is certainly not a rule regulating recruitment of such persons; nor can it be said to be a rule regulating conditions of services of such persons. The rules relating to recruitment and conditions of service contemplated by the proviso to Article 309 are of general operation, though they may be applied to particular class of Government servants. The notification dated 25th March, 1959 could not therefore have the effect of validating what had been done earlier with respect to trained teachers in contravention of the rule as to retirement.

Appeals by Special Leave from the Judgment and Order dated the 27th September, 1961 of the Mysore High Court in Writ Petitions Nos. 417, 466, 483, 339 and 510 of 1959 respectively.

B. R. L. Iyengar and *B. R.G.K. Achar*, Advocates, for Appellant (in all the Appeals).

R. Gopalakrishnan, Advocate, for Respondents (in all the Appeals).

The Judgment of the Court was delivered by

Wanchoo, J.—These appeals by Special Leave raise common questions and will be dealt with together. We shall take the facts of one appeal C.A. (No. 237) in order to understand the questions in dispute and it will be unnecessary to refer to the facts in other cases for they are admittedly similar.

Nanjappa, respondent in C.A. No. 237 of 1964, was a trained teacher and was headmaster of a Government Boys' Middle School. He completed the age of 55 years on 3rd February, 1958 and was ordered to be retired from service from that date on the ground of superannuation. Thereupon he filed a writ petition in the High Court of Mysore, and the main contention raised on his behalf was that rule 294 (a) of the Mysore Service Regulations (hereinafter referred to as the Regulations) which prescribed the age of retirement of Government servants, had been amended with respect to trained teachers from 29th April, 1955, and in the case of such teachers the normal age of superannuation was fixed at 58 years instead of 55 years. Consequently, the respondent could not be retired on completion of the age of 55 years and the order by which he was retired at that age as if he was superannuated was illegal on the ground that it was against the rule applicable to trained teachers.

This contention was traversed on behalf of the State, which is the appellant before us. It was admitted that there was some change in the rule relating to superannuation. Even so it was contended that the age of superannuation in the case of trained teachers remained the same, namely 55 years and it was open to the State to retire trained teachers at the age of 55 years, though they could be retained upto the age of 58 years if they were found fit and efficient. Besides reliance was also placed on behalf of the State on a notification of the Governor issued on 25th March, 1959 and it was urged that that notification issued under Article 309 of the Constitution validated the action taken in retiring Nanjappa, and others like him, on completion of the age of 55 years. It was not disputed on behalf of the State that the sole reason for retiring Nanjappa and others like him was that they had attained the age of 55 years and that there was nothing against their fitness or efficiency to justify the order of retirement.

Two principal points were thus raised before the High Court. The first was with respect to the interpretation of rule 294 (a) with particular reference to the amendment which was made on 29th April, 1955. The second was with respect to the effect of the Governor's notification dated 25th March, 1959. On the first point, the High Court held that the change made in rule 294 on 29th April, 1955 clearly provided that in the case of trained teachers the normal age of retirement would be 58 years, though the Government would have the right to retire them earlier if they were neither fit nor efficient. On the second point, the High Court held that the notification of 25th March, 1959 could not be a rule within the meaning of Article 309 of the Constitution and could not have the effect of validating what had been done earlier with respect to trained teachers in contravention of the rule as to retirement. The appellant-State then applied for leave to appeal to this Court which was refused. It then came to this Court and was granted Special Leave; and that is how the matter has come up before us.

We are of opinion that the High Court is right on both the points urged before it. Rule 294 (a) of the Regulations which was in force before the change was made on 29th April, 1955, was in these terms :—

"294. (a) A Government servant in superior or inferior service, who has attained the age of fifty-five years, may be required to retire, unless Government considers him efficient, and permits him to remain in the service. But as the premature retirement of an efficient Government servant impose a needless charge on the State, this rule should be worked with discretion. And in cases in which the rule is enforced, a statement of the reasons for enforcing it shall be placed on record."

There is no doubt that this rule as it was before 29th April, 1955 provided that normal age of retirement was 55 years but it gave discretion to Government to extend the service of efficient Government servants beyond the age of 55 years.

In August, 1954, however, the Government issued a notification which applied to trained teachers in the Education Department. In this notification it was directed that in the Education Department the age of retirement of trained teachers would generally be 58 years. With regard to teachers who were not trained and who were otherwise efficient, the age of retirement would also be 58 years. Teachers trained and untrained who had not got a good record of service and who were not upto the mark would be retired at 55 years. The relaxation regarding the age of retirement would be in force only till such time as sufficient number of trained teachers became available for employment. The order also contained a direction that a suitable note would be added to rule 294 (a) of the Regulations. In consequence of this order, necessary additions were made to the Regulations by the then Rajpramukh of Mysore and Note 4 was added to rule 294 (a) in these terms :—

"The age of retirement of trained teachers in the Education Department may generally be fifty-eight years, and in the case of teachers who are not trained but who are otherwise efficient the age of retirement may also be fifty-eight years....."

The Director of Public Instruction in Mysore is empowered to order the retirement of teachers trained and untrained in the non-gazetted cadre who have not got a good record of service and who are not upto the mark, at the age of fifty-five years, and in the case of gazetted servants, with the concurrence of Government in each case.

The above provision shall be deemed to have come into force with effect from the 20th August, 1954."

It is the effect of this addition to rule 294 (a) which falls to be considered before us. We shall in the present appeals confine ourselves to the case of trained teachers for the respondents before us are admittedly all trained teachers. What we say here will not necessarily apply to teachers who are not trained. So far as trained teachers are concerned there is no doubt that Note 4 carved out an exception to rule 294 (a) which provides that the normal age of retirement is 55 years and it is for the Government to decide whether to grant extensions to persons after they completed 55 years and this grant of extension was on the basis of such persons remaining efficient in the opinion of Government after the age of 55 years. But Note 4 made a change in that position so far as trained teachers were concerned. That change was that in the case of trained teachers the normal age of retirement was to be 58 years. The later part of the note however gave power to the Director of Public Instruction to retire even trained teachers in the non-gazetted cadre provided they had not a good record of service and were not upto the mark. In such a case the Director had the power to retire them at the age of 55 years if he was of the view that they had not a good record of service and were not upto the mark. Thus under rule 294 (a) as it was before 29th April, 1955 the normal age of retirement was 55 years for all including trained teachers and it was for the Government to give extension on the ground of fitness. But after Note 4 was added to rule 294 (a), the position with respect to trained teachers was changed and trained teachers were normally entitled to continue in service till the age of 58 years unless the Director or the Government as the case may be, was of the opinion that they had not a good record of service and were not upto the mark. Therefore after the change made on 29th April, 1955, trained teachers could only be retired at the age of 55 years if the Director of Public Instruction or the Government, as the case may be, came to the conclusion that they had not a good record of service and were not upto the mark. Therefore, before the respondents in the present appeals could be retired at the age of 55 years, the Director of Public Instruction or the Government, as the case may be, had to come to the conclusion that they had not a good record of service and were not upto

the mark. If such a conclusion was not arrived at, they would be entitled under *Note 4* to continue in service upto the age of 58 years. It is not disputed on behalf of the appellant that no such decision, namely, that the respondents had not a good record of service and were not upto the mark, was taken.

Stress is laid on the word "generally" appearing in the first part of *Note 4*. The presence of that word does not mean that the normal age of retirement is still 55 years. The reason why the word "generally" is used in the earlier part of *Note 4* is to be found in the latter part of the same note where power has been given to the Director of Public Instruction to retire trained teachers at the age of 55 years if they have not a good record of service and are not upto the mark. Because of that power it was necessary to use the word "generally" in the earlier part of the note, as otherwise there would be an indefeasible right in trained teachers to continue in service upto the age of 58 years, even if they did not have a good record of service and were not upto the mark.

In the circumstances, the respondents would be entitled to continue in service upto the age of 58 years and could not be retired at the age of 55 years in view of the exception carved out by *Note 4* in the general provision contained in rule 294 (a). The contention of the appellant in this connection must therefore be rejected.

We now come to the notification dated 25th March, 1959. That notification reads thus :—

"In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India and with the approval of the Central Government under the proviso to sub-section (7) of section 115 of the States Reorganisation Act, 1956 (Central Act XXXVII of 1956), the Governor of Mysore is pleased to make the following rule, namely :—

Notwithstanding anything contained in *Note 4* to Article 294 of the Mysore Service Regulations (Eighth Edition), Government Servants who have been retired from service on the attainment of the age of fifty-five, during the period between 7th day of June, 1957 and the 28th day of October, 1958 shall be deemed to have been validly retired from service on superannuation."

We are of opinion that such a rule cannot be made under the proviso to Article 309 of the Constitution. We are expressing no opinion as to the power of the Legislature to make a retrospective provision under Article 309 of the Constitution wherein the appropriate Legislature has been given the power to regulate the recruitment and conditions of service of persons appointed to public service and posts in connection with the affairs of the Union or of any State by passing Acts under Article 309 of the Constitution read with item 70 of List I of the Seventh Schedule or item 41 of List II of the Seventh Schedule. The present rule has been made by the Governor under the proviso to Article 309. That proviso lays down that it shall be competent for the Governor or such person as he may direct in the case of services and post in connection with the affairs of the State to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act by the appropriate Legislature. Under the proviso the Governor has the power to make rules regulating the recruitment and conditions of service of persons appointed to such services and posts in connection with the affairs of the State. The question is whether the notification of 25th March, 1959 can be said to be such a rule. We are of opinion that this notification cannot be said to be a rule regulating the recruitment and conditions of service of persons appointed to the services and posts in connection with the affairs of the State. All that the rule does is to say in so many words that certain persons who had been, in view of our decision on the first point, invalidly retired should be deemed to have been validly retired from service on superannuation. It would if given effect contravene Article 311 of the Constitution. Such a rule in our opinion is not a rule contemplated under the proviso to Article 309. Under the proviso the Governor can make rules regulating the recruitment and conditions of service of persons appointed to services and posts in connection with the affairs of the State. But all that this notification or rule does is to say that certain persons who had been wrongly retired must be treated to have been rightly retired. This power of validating an order which was invalid when it was made does

not in our opinion flow from the power conferred on the Governor to make rule regulating recruitment and conditions of service of persons appointed to services—and posts in connection with the affairs of the State. It is certainly not a rule—regulating recruitment of such persons; nor can it be said to be a rule regulating—conditions of services of such persons. The rules relating to recruitment and conditions of service contemplated by the proviso to Article 309 are general in operation—though they may be applied to a particular class of Government servants. But what this notification or rule does is to select certain Government servants who had been illegally required to retire and to say that even if the retirement had been illegal, that retirement should be deemed to have been properly and lawfully made. We are of opinion that such a declaration made by the Governor—and that is all that the notification or the rule does—cannot in any sense be regarded as a rule made under the proviso to Article 309 governing the conditions of service of persons appointed to services and posts in connection with the affairs of the State. In this view of the matter it is not necessary to decide whether a rule of this kind which is purely retrospective could be made as a rule governing the conditions of service of persons appointed in connection with the affairs of the State.

The appeals therefore fail and are hereby dismissed. The respondents will get their costs from the appellant. There will be one hearing fee.

V.K.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYATULLAH, J. C. SHAH AND J. M. SIKRI, JJ.

The Principal, Patna College, Patna and others

... *Appellants.**

v.

Kalyan Srinivas Raman

.. *Respondent.*

Patna University Act (Bihar Act XXV of 1951), section 34 (b)—Regulation 4 of the Regulations framed in 1961 by the Academic Council of the Patna University under—Regulation 4 requiring 75 per cent attendance in lectures, tutorials and/or practicals for eligibility for appearance in University examination—If postulates 75 per cent attendance at lectures, tutorials and/or practicals severally or conjointly.

Constitution of India (1950), Article 226—Orders passed by educational authorities under relevant regulations framed by the University—Interference with by High Court in writ petition—Limitations.

When Regulation 4 of the Regulations framed (and brought into force on January 23, 1961) by the Academic Council of the University of Patna under section 34 (b) of the Patna University Act (Bihar Act XXV of 1951) requires that every candidate presented at any University Examination shall be required to complete the regular course of study prescribed in each subject which he offers for the examination and that no candidate shall be considered to have completed the regular course of study in any subject unless he has attended at least seventy-five per cent. of the lectures, tutorials and/or practicals as the case may be, delivered or provided in that subject, what is meant is that the requirement of 75 per cent. attendance has to be satisfied by a candidate disjunctively by reference to the lectures and/or practicals taken separately and not collectively by reference to lectures, tutorials and/or practicals all taken together. If the said requirement is read collectively, a student may be entitled to claim to have completed the regular course of study without attending any single practical or tutorial, as the case may be, if he has attended all the lectures in a given subject and will lead to the unreasonable consequence that attendance at the lectures alone may, in a given case, entitle a student to appear for the examination though he may have done no tutorials at all. This could not have been the intention of the Regulations which attach considerable importance to practical work.

It is plain that the words "and/or" have been used in Regulation 4 because in some subjects both tutorials and practicals are prescribed, whereas in some others either tutorials or practicals are prescribed; and so, the effect of the words "and/or" is that where tutorials and practicals are both prescribed, the requirement of 75 per cent attendance has to be satisfied with reference to

each one of them ; where however, either tutorials or practicals are prescribed, the said requirement has to be satisfied by reference to either the tutorials or the practicals whichever may have been prescribed.

It is hardly necessary to emphasise that in dealing with matters relating to orders passed by authorities of educational institutions under Article 226 of the Constitution of India, the High Court should normally be very slow to pass *ex parte* interim orders, because matters falling within the jurisdiction of the educational authorities should normally be left to their decision and the High Court should interfere with them only when it thinks it must do so in the interests of justice. Where the question involved is one of interpreting a regulation framed by the Academic Council of a University, the High Court should ordinarily be reluctant to issue a writ of *certiorari* where it is plain that the regulation in question is capable of two constructions and it would generally not be expedient for the High Court to reverse a decision of the educational authorities on the ground that the construction placed by the said authorities on the relevant regulation appears to the High Court less reasonable than the alternative construction which it is pleased to accept.

It is true that if justice demands that the High Court should receive a writ petition even on Sunday, the Court should and ought to accept the petition. But the limits of the High Court's jurisdiction to issue a writ are well-recognised and it is, on the whole, desirable that the requirements prescribed by judicial decisions in the exercise of writ jurisdiction in dealing with such matters should be carefully borne in mind.

Appeal by Special Leave from the Judgment and Order, dated the 14th May, 1965 of the Patna High Court in Civil Writ Jurisdiction Case No. 345 of 1965.

C.K. Daphitary, Attorney-General for India (*R. N. Sinha* and *S. P. Varma*, Advocates, with him), for Appellants.

Basudev Prasad, K. Rajendra Chaudhuri and *K. R. Chaudhuri*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Gajendragadkar, C.J.—This appeal raises a short question about the construction of Regulation 4 of the Regulations framed by the Academic Council of appellant No. 3, the Patna University under section 34 (b) of the Patna University Act, 1951 (Bihar Act XXV of 1951). The respondent Kalyan Srinivas Raman was a student who appeared at and passed the test examination held by the Patna College for sending up students for the University Examination B.A. Part I. His name was shown in the list of candidates who were eligible to appear for the said University Examination and this list was published on 26th March, 1965, by the college authorities. On 29th March, 1965, however, a notice was put up on the notice-board by appellant No. 1, the Principal of the Patna College, indicating that the respondent was not eligible to be sent up for the said University Examination, 1965 and that his roll number had been included in the list published earlier due to a clerical mistake. The respondent felt aggrieved by this notice and filed a writ petition in the Patna High Court on Sunday, the 18th April, 1965 and presented it to the learned Chief Justice, of the High Court at his residence. By this writ petition, the respondent prayed for a writ of *mandamus*, or for any appropriate order or direction for quashing and cancelling the notice issued by appellant No. 1 on the 29th March, 1965 ; he further prayed for an appropriate order or direction to appellant No. 1 ; the Vice-Chancellor of the Patna University, appellant No. 2, and appellant No. 3 to permit him to appear at the said University Examination.

The learned Chief Justice received the writ petition and directed that the same should be heard by a Bench of two Hon'ble Judges of the said High Court at night. Accordingly, the Division Bench heard the said writ petition at the residence of one of the two learned Judges and passed an interim order admitting the writ petition and directing that pending its hearing, the respondent should be permitted to appear at the said Examination, but that his result should not be published until disposal of his application. It appears that the writ petition itself had not been sworn to and no vakalatnama had been filed when it was presented to the learned Chief Justice and was subsequently admitted by the Division Bench. After passing

the interim order, the Division Bench directed that the respondent could get the affidavit sworn and vakalatnama filed the next day.

In obedience to the said interim order, appellant No. 1 forwarded the respondent's application to appellant No. 3, though he made it clear that the respondent had not attended adequate number of practical classes and his record of practical work was not satisfactory and as such, he did not fulfil the requirements of the relevant Regulations. As a consequence, the respondent was allowed to appear at the said Examination.

The appellants then appeared before the High Court and resisted the respondent's claim. They urged that the relevant Regulations did not justify the respondent's contention that he was eligible to appear at the said Examination and they contended that the impugned notice issued by appellant No. 1 was fully justified.

The learned Judges who heard the writ petition have, however, rejected the contentions raised by the appellants in regard to the construction of the relevant regulations and have held that under the said regulations, it was obligatory on appellant No. 2 to have considered the question whether the deficiency in the respondent's attendance in the practicals of Geography should be condoned or not. That is why the High Court has directed that a writ in the nature of *certiorari* should be issued to quash the impugned notice, and that a writ in the nature of *mandamus* should be issued to the appellants directing them to act in accordance with regulation 5 in the light of the construction placed by the High Court on the said regulation. The High Court has also ordered that if the shortage in the respondent's attendance was condoned by appellant No. 2, the respondent's result in the examination which he had taken under the interim order of the Court will be published; otherwise his appearance at the said examination will have to be ignored. It is against this order that the appellants have come to this Court by Special Leave; and so, the principal point which arises for our decision in the present appeal is whether the High Court has properly construed Regulation 4.

The relevant facts are not in dispute. In Geography, the respondent attended 73 out of 93 lectures, 15 out of 20 tutorials, and 6 out of 25 practicals. His percentage of attendance taken separately was 75, 75 and 24; but if the said percentage was taken together, it would come to 66. The respondent's case was that under Regulation 4, he is required to keep at least 75 per cent. attendance at lectures, tutorials and practicals all taken together, and that the requirement of 75 per cent. attendance has not to be satisfied disjunctively by reference to lectures, tutorials and practicals. On the other hand, the appellants argued that the requirements about 75 per cent. attendance has to be satisfied by a candidate in reference to lectures, tutorials and practicals taken separately, and not collectively; and unless that requirement is satisfied, the student does not become eligible to appear for the examination, subject to this that the shortage in attendance may be condoned as provided by the relevant regulations and in that case, the student may be permitted to appear at the examination. It is common ground that if the interpretation for which the appellants contend is accepted, the notice issued by appellant No. 1 would be valid; on the other hand, if the interpretation for which the respondent contends is upheld, the order passed by the High Court could not seriously be challenged, because on the construction suggested by the respondent and accepted by the High Court, the shortage in attendance, which is proved, could have been condoned by the Vice-Chancellor if he thought it fair and reasonable to do so; and it is not disputed that the matter about condoning the shortage in attendance of the respondent was not referred to the Vice-Chancellor and he has not decided the question as to whether the said shortage should be condoned.

Let us, therefore, proceed to construe Regulation 4. The Academic Council of appellant No. 3 is an authority whose powers and duties have been defined by section 22 of the Patna University Act; these include the power of superintendence and control over maintenance of standards of instruction and education. The said Council is authorised by section 34 to make regulations about the conditions under

which a student shall be admitted to the Degree or Diploma Course and to the examinations of the University and shall be eligible for Degrees and Diplomas. It is in pursuance of the powers thus conferred on the Academic Council that the relevant Regulations have been framed. These Regulations were brought into force on the 23rd January, 1961.

Regulation 1 deals with lectures, tutorial instruction and practical work. It provides that a College or a University Department or an Institute shall provide for the delivery of at least so many lectures and so many periods of tutorial instruction and practical work as may be fixed by the Academic Council from time to time for students who are admitted in that College or the University Department or the Institute. Proviso (1) (d) to the said Regulation lays down that in the Faculties of Arts, Science and Commerce, in any subject in which practical examination has been prescribed, there shall be at least one practical class of two periods' duration in the Pre-University class. For the B.A. and B.Sc. Examinations in which practical examination is prescribed, there shall be in each year two practical classes per week each of two periods' duration. Proviso (4) to Regulation 1 requires that except as provided in (1) (a) and (d) of this Regulation, in all Faculties in subjects in which practical work is prescribed, every student shall be required to do practical work prescribed by the Academic Council, regularly and under proper supervision and the number of lectures and hours of practical work for each subject shall be fixed by the Academic Council after considering the recommendations of the Faculty concerned. This Regulation clearly brings out the fact that the Academic Council attaches considerable importance to the practical work and the tutorials along with the lectures, and provides that the student has to attend not only the lectures delivered, but has to do the practical work and to attend tutorials.

Regulation No. 4 which falls to be construed in the present appeal reads thus :

"Every candidate, presented by a College or a University Department at any University examination, shall be required to complete the regular course of study, prescribed by these regulations, in each subject which he offers for the examination. No student shall be considered to have completed the regular course of study in any subject unless he has attended at least seventy-five per cent of the lectures, tutorials and/or practicals, as the case may be, delivered or provided in that subject, in one or more colleges or University Departments admitted in that subject, and has devoted due attention to that part of the course which consists of tutorial instruction or practical work.

The percentage, specified above, shall be calculated on the total number of lectures, tutorials and practicals delivered or provided during the session".

Regulation No. 5 deals with the question of condoning shortage in attendance ; it reads thus :—

"In case of serious illness or other unavoidable circumstances, a shortage of attendance at lectures, tutorials and practicals to the extent of fifteen per cent may be condoned.

Shortages up to five per cent shall be considered and may, in suitable circumstances, be condoned by the Principal of a College or the Head of a University Department or the Director of the Institute or the Head of the Institution concerned.

Shortages exceeding five per cent but not exceeding fifteen per cent shall be considered and may in suitable circumstances, be condoned by the Vice-Chancellor."

The last regulation to which reference must be made in Regulation No. 7; it reads thus :—

"Every candidate for each University Examination shall produce a certificate from the Principal of College, the head of the University Department or the Institute concerned of (a) good conduct, (b) completion of the regular course of study, (c) having fulfilled the prescribed requirements regarding attendance at lectures, tutorials and practicals, and (d) satisfactory record of tutorial and/or practical work."

In dealing with Regulation 4, it is necessary to bear in mind two broad considerations. The first consideration is that the modern methodology of education in all civilised countries attaches considerable importance to the tutorials and the practical work done by the student in addition to attending lectures. The tendency in modern times is to bring the students into direct personal contact with the tutors so as to enable the tutors to guide and coach the students individually as far as

may be possible. For that purpose, small groups of students are formed who are placed under different tutors for different subjects. The importance of practicals has also been well-recognised and education does no longer depend merely upon lectures as it used to do at one time in our country. The second consideration which may not be irrelevant is that ever since the present regulations were brought into force in 1961, appellant No. 3 and colleges within its jurisdiction appear to have consistently interpreted Regulation 4 in the manner suggested by appellant No. 3. It is of course true that the two considerations to which we have just referred cannot materially govern the construction of the regulation; that must inevitably depend upon the words used by the regulation itself; but in interpreting the words, these two considerations may not be treated as irrelevant.

The appellants contended that the High Court was in error in holding that the requirement about 75 per cent attendance had to be considered collectively by taking the lectures, tutorials and/or practicals together. Their case is that the said requirement applies to lectures, tutorials and/or practicals separately. It is plain that the words "and/or" have been used in the regulation, because in some subjects both tutorials and practicals are prescribed, whereas in some others either tutorials or practicals are prescribed; and so, the effect of the words "and/or" is that where tutorials and practicals are both prescribed, the requirements of 75 per cent attendance has to be satisfied in reference to each one of them; where, however, either tutorials or practicals are prescribed, the said requirement has to be satisfied by reference to either the tutorials or the practicals whichever may have been prescribed in a given subject. The High Court has, no doubt, made an emphatic finding that the relevant words used in this regulation admit of only one construction, and that is that the requirement of 75 per cent attendance has to be judged by reference to lectures, tutorials and/or practicals all taken together. We are unable to agree. It seems to us that in the context, it is more reasonable to hold that the said requirement must be read disjunctively; and so, it must be satisfied by the student by reference to lectures, tutorials and/or practicals as the case may be.

In construing Regulation 4 we must have regard to the fact that the last part of the Regulation requires that the student must have devoted due attention to that part of the course which consists of tutorial instruction or practical work; and this requirement necessarily postulates that the student has to do some practical work and has to receive tutorial instruction.

The requirement of Regulation 7 also emphasises the fact that every student who can be said to have completed the regular course of study as prescribed by Regulation 4, must satisfy the requirement as to attendance at lectures, tutorials and practicals and must claim satisfactory record of tutorial and/or practical work. Regulation 7 (d) which we have already cited, emphasises, as does the last portion of Regulation 4, that every student has to do tutorials and/or practicals work, as the case may be. In other words, where tutorials and practicals are both prescribed, the student must not only do tutorials and practicals, but must have satisfactory record in that behalf. Where tutorials or practicals are prescribed, a similar test has to be satisfied.

In view of this position, it seems somewhat difficult to accept the correctness of the conclusion reached by the High Court that the requirement about 75 per cent attendance must be taken collectively. It is clear that if the said requirement is read collectively, a student may be entitled to claim to have completed the regular course of study without attending any single practical or tutorial, as the case may be, if he has attended all the lectures in a given subject. Take, for instance, the case of English, History or Political Science in the group for which the respondent was studying. It is not disputed by Mr. Basudev Prasad that in these subjects theoretically, it would be open to the student to attend the maximum number of lectures and not to do any tutorial at all. In other words, the construction placed by the High Court upon Regulation 4 leads to this unreasonable consequence that attendance at the lectures alone may, in a given case, entitle a student to appear for the examination, though he may have done no tutorial at all. In our

opinion, this could not have been the intention of the regulation. It is true that the second clause of Regulation 4 requires that the percentage in question shall be calculated on the total number of lectures, tutorials and practicals delivered or provided during the session ; but this provision is in the nature of a mere corollary to the main provision prescribed by Regulation 4, and if the requirement as to 75 per cent attendance has been prescribed separately in relation to lectures, tutorials and/or practicals, the second clause in question must be read accordingly. Thus read, it only means that when the percentage is determined in reference to lectures, tutorials and practicals, what has to be taken into account is the total number of lectures delivered, or tutorials and practicals held during the session in question. We have carefully considered the reasons given by the High Court in support of its conclusion, but we are not satisfied that those reasons justify the construction which the High Court has placed on the material words used in Regulation 4.

The High Court appears to have taken the view that its conclusion about the effect of Regulation 4 is supported by the old Regulation which was superseded in 1961. The old Regulation was 1 (7) ; it read thus :—

"1. A College or a University Department admitted in any University examination shall provide for the delivery of at least so many lectures and for at least so many periods of tutorial instruction and practical work as may be fixed by the Academic Council from time to time for students who take up that subject, provided that—

* * * * * *

* * * * * *

(7) in order to qualify to appear at any of the University examinations in any Faculty a candidate shall be required—

(i) to attend at least 75 per cent of the lectures delivered in each subject offered by him for such University examination,

(ii) to attend in each subject at least 75 per cent of the tutorial classes, of the Moot Courts and of the practical classes, as the case may be ;

(iii) in the case of I.A., I.Sc., I. Com., B.A., B.Sc., and B.Com. examinations, to secure marks not less than 25 per cent out of the total marks of 3 periodical examinations in each subject within two years, subject to the condition that a candidate should secure 20 per cent of the marks allotted for the practical examination.

* * * * * * "

Regulation 5 of the said old Regulations reads thus :—

" (1) No student shall be considered to have completed the regular course of study in any subject for the I.A., I.Sc., I. Com., B.A., B.Sc., and B.Com. examinations unless he has satisfied the conditions laid down in clause (7) of Regulation 1 of this Chapter and for examinations other than these, unless he has attended at least 75 per cent of the lectures, tutorials and practicals, as the case may be, delivered in that subject, in one or more Colleges or University Departments admitted in that subject, and has devoted due attention to that part of the course which consists of tutorial instruction or practical work ;

(2) The percentage, specified in clause (1), shall be calculated on the total number of lectures delivered during the prescribed session. "

It would be noticed that under Regulation 1 (7) read with Regulation 5 of the old Regulations, the position was that with regard to the examinations specified in the first part of Regulation 5 (1), the requirement as to 75 per cent attendance was expressly specified separately in reference to the lectures, tutorial classes, Moot Courts, and the practical classes, as the case may be. Sub-clauses (i) and (ii) of clause (7) of Regulation 1 are quite clear and unambiguous in that behalf. With regard to the other examinations falling under the latter part of Regulation 5 (1), however, the position was that Regulation 1 (7) was not made applicable to them just as it was made applicable to the examinations mentioned in the first part ; and so, Regulation 5 (1) compendiously prescribes the requirement as to 75 per cent by putting the lectures, tutorials and practicals all together. The context shows that the requirements as to 75 per cent attendance by reference to the lectures, tutorials and practicals which is prescribed for this latter category of examinations, was not of a different character at all. This requirement had to be satisfied by reference to each one of them viz., the lectures, tutorials and practicals as the case

may be. Instead of repeating sub-clauses (i) and (ii) of Regulation 1 (7), Regulation 5 (1) merely for the sake of convenience, has compressed the said two clauses into one clause ; and so, we think the High Court was in error in assuming that under the old Regulations with regard to this latter class of examinations, the requirements as to 75 per cent attendance was in any way different from the same requirement in regard to the examinations mentioned in the first part of the said Regulation.

But assuming for the sake of argument that the said requirement was different in regard to the latter category of examinations, it is not easy to see how that can support the conclusion that the present Regulation 4 has assimilated all the examinations to the said latter class of examinations in Regulation 5 (1) by prescribing that 75 per cent attendance need not be in relation to the lectures, tutorials and practicals separately, but should be in relation to all the three taken collectively. In our opinion, having regard to the context, it would be more reasonable to hold that the present Regulation prescribes the requirement as to 75 per cent attendance in lectures, tutorials and/or practicals separately in relation to all the examinations.

Mr. Basudev Prasad has sought to rely on Regulation 9 contained in Chapter VI of the Examination Regulations which deal with B.A., Part I Examination of the Three-Year Degree Course in Arts. The said Regulation provides that in order to pass the Degree Part I Examination, a candidate must obtain not less than 30 per cent of the total marks in each subject and 33 per cent in the aggregate. He argues that the provision of Regulation 9 would support the respondent's case that it could not have been the intention of Regulation 4 to require that the regular course of study contemplated by it postulates 75 per cent attendance at lectures, tutorials and/or practicals taken severally and not conjointly. We are unable to see how the provision made by Regulation 9 dealing with the examinations can be material in construing the words used in Regulation 4. Therefore, we do not think Mr. Basudev Prasad is right in contending that Regulation 9 of the Examination Regulations supports the respondent's case.

It appears that before the writ petition was filed by the respondent in the present case, his father Mr. C. K. Raman, I.C.S., wrote a long letter on 11th April, 1965 to appellant No. 1 inviting him to reconsider his decision in the case of his son and to allow his son to take the University examination in question. In this long communication which is argumentative, the respondent's father has adopted a tone which indicates that he attempted to throw his weight about in persuading appellant No. 1 to cancel the impugned notice. Appellant No. 1 promptly replied to the said communication and informed the respondent's father that he had referred the case of the respondent to the Vice-Chancellor with a statement of his attendance together with his letter for such action as he thought best under the circumstances. Appellant No. 1 added that the Vice-Chancellor had decided that it was not possible to accept the request made by the respondent's father as the University Regulations did not permit the same.

It would be recalled that the impugned notice was published on 29th March, 1965, and the letter written by the respondent's father on the 11th April was replied by appellant No. 1 on the 12th April. Even so, the respondent did not file his writ petition until Sunday, the 18th April; and as we have already mentioned, the writ petition was presented at the bungalow of the Chief Justice and was heard for admission and interim orders on Sunday night. It is true that if justice demands that the Court should receive a petition even on Sunday, the Court should and ought to accept the petition ; but having regard to the fact that the petitioner postponed the filing of the application until Sunday (18th April, 1965) night, and other relevant circumstances to which we have already adverted, we think it would have been better if the High Court had not passed an interim order on the said night as it has done. It is hardly necessary to emphasise that in dealing with matters relating to orders passed by authorities of educational institutions under Article 226 of the Constitution, the High Court should normally be very slow to pass *ex parte* interim orders, because matters falling within the jurisdiction of the educational authorities should normally be left to their decision, and the High Court should interfere with

them only when it thinks it must do so in the interests of justice. Even on the merits, we think we ought to point out that where the question involved is one of interpreting a Regulation framed by the Academic Council of a University, the High Court should ordinarily be reluctant to issue a writ of *certiorari* where it is plain that the Regulation in question is capable of two constructions, and it would generally not be expedient for the High Court to reverse a decision of the educational authorities on the ground that the construction placed by the said authorities on the relevant Regulation appears to the High Court less reasonable than the alternative construction which it is pleased to accept. The limits of the High Court's jurisdiction to issue a writ of *certiorari* are well recognised and it is, on the whole, desirable that the requirements prescribed by judicial decisions in the exercise of writ jurisdiction in dealing with such matters should be carefully borne in mind.

In the result, the appeal is allowed, the order passed by the High Court is set aside and the writ petition filed by the respondent is dismissed. Under the unusual circumstances of this case, we direct that the respondent should pay the costs of the appellants throughout.

V.K.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYATULLAH, J. C. SHAH AND S. M. SIKRI, JJ.

Sawai Singhai Nirmal Chand

.. *Appellant**

v.

The Union of India

.. *Respondent.*

Civil Procedure Code (V of 1908), section 80 and Order 21, rule 63—Scope and applicability of section 80—Suit under Order 21, rule 63 against Government—Provisions of section 80 if attracted.

The material words used in section 80 of the Civil Procedure Code are wide and unambiguous; they are express, explicit and mandatory, and it would be difficult to except from their operation any proceeding which can be regarded as a suit against the Government. While dealing with the applicability of section 80, the question to ask is : is it a suit against the Government or not ? If it is, then section 80 by the very force of its words must apply.

Thus, a suit filed against the Union of India under Order 21, rule 63 of the Civil Procedure Code attracts the provisions of section 80 of the Civil Procedure Code. The contention that the suit under Order 21, rule 63 is a continuation of attachment proceedings and as such cannot be regarded as a suit proper which is included within the purview of section 80 is untenable. The scope of a suit under Order 21, rule 63 is very different from and wider than that of the investigation under Order 21, rule 58. In fact it is the order made in the said investigation that is the cause of action of the suit under Order 21, rule 63.

Appeal from the Judgment and Decree dated the 14th March, 1961 of the Madhya Pradesh High Court in First Appeal No. 57 of 1959.

Bishan Narain, Senior Advocate (*S. N. Prasad*, Advocate, and *J. B. Dadachanji*, Advocate of *M/s. J. B. Dadachanji & Co.*, with him), for Appellant.

N. D. Karkhanis and *R. N. Sachthey*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Gajendragadkar, C.J.—The short question of law which arises in this appeal is whether a suit filed in pursuance of Order 21, rule 63 of the Code of Civil Procedure attracts the provisions of section 80 of the Code. This point arises in this way. One Phool Chand, the predecessor-in-title of the appellant Sawai Singhai Nirmal Chand, instituted a suit against the respondent, the Union of India, in the Court

of the Second Additional District Judge, Jabalpur, and obtained a decree on 25th April, 1951 for Rs. 24,234-14-0 and proportionate costs with interest at 4 per cent per annum. The respondent challenged the said decree by preferring an appeal in the High Court. Pending the appeal, the respondent deposited the decretal amount of Rs. 31,849-9-9. On 14th December, 1952 Phool Chand withdrew Rs. 28,032-12-0 out of the said amount after furnishing due security in that behalf. Ultimately, the respondent's appeal was partly allowed on 26th June, 1954, and the decretal amount was reduced to Rs. 10,971-13-6. In the result, the total decretal amount due to the decree-holder Phool Chand came to Rs. 12,691-13-6; and that meant that he had withdrawn Rs. 15,340-14-6 in excess of his legitimate dues.

On 4th September, 1954, the respondent applied for restitution of the said amount and claimed interest thereon. The Second Additional District Judge, Jabalpur, allowed the said application, and in execution of it, the respondent sought for the recovery of the said amount by attachment and sale of certain immovable properties of Phool Chand, mentioned in the application. These properties were accordingly ordered to be attached. But, meanwhile, they had been sold by Phool Chand to the appellant by a registered sale deed executed on 9th January, 1953. That is why the appellant objected to the said attachment under Order 21, rule 58 of the Code, but his objection was over-ruled and his application was dismissed by the Second Additional District Judge on 16th April, 1957. It is this order which has led to the present suit under Order 21, rule 63 of the Code.

Before the appellant filed the present suit on 23rd June, 1958 in the Court of the First Additional District Judge, Jabalpur, he gave notice to the respondent under section 80 of the Code on 12th April, 1958. In the said suit, he claimed a declaration that the properties in question could not be attached and sold inasmuch as the title in respect of the said properties vested in him by virtue of a valid sale deed executed in his favour by Phool Chand. The appellant also claimed an injunction restraining the respondent from attaching and selling the said properties.

In defence, the respondent raised a plea of limitation. It is common ground that the period of limitation prescribed for a suit under Order 21, rule 63 by Article 11 of the Limitation Act is one year from the date of the order under Order 21, rule 58. The respondent urged that section 80 of the Code did not apply to the present suit; and so, the period covered by the notice served by the appellant on the respondent could not be excluded for the purpose of calculating limitation in the present case. It is not disputed that if section 80 applies to the present suit and the period covered by the notice can be taken into account, the suit is within time. It is also not disputed that if section 80 does not apply to the present suit and the period of the notice cannot be taken into account, the suit is barred by time; and so at the preliminary stage, the only question which fell to be determined on the pleadings of the parties was whether section 80 applies to the present suit. Both the learned trial Judge and the High Court of Madhya Pradesh, Jabalpur, have answered this question against the appellant, and the suit has, therefore, been dismissed as barred by time. It is against this decision that the appellant has come to this Court with a certificate granted by the said High Court. That is how the only point which calls for our decision in the present appeal is whether section 80 of the Code applies to a suit instituted in pursuance of the provisions of Order 21, rule 63.

Let us begin by referring to the provisions of Order 21, rules 58 and 63. Order 21, rule 58 deals with the investigation of claims to, and objections to attachment of, attached properties. It is under this rule that a person whose property is wrongfully attached in execution of a decree passed against another, is entitled to object to the said attachment. On such an application being made, a summary enquiry follows and the attachment is either raised or is not raised and the objection to attachment is allowed or is not allowed according as the Court trying the application is satisfied that the objector is or is not justified in objecting to the attachment.

After the final order is passed one way or the other as a result of the investigation made in such proceedings, rule 63 comes into operation. It provides that where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive. It is thus plain that where an order is passed in objection proceedings commencing with rule 58, it would be final subject to the result of the suit which a party aggrieved by such order may institute; and that means that if a party is aggrieved by an order passed in these proceedings, he can have the said order set aside or reversed by bringing a suit as provided by rule 63 itself and such a suit has to be filed within one year from the date of the impugned order. That is the nature of the suit which the appellant has brought in the present case.

In considering the question whether this suit falls within the purview of section 80 of the Code, it is necessary to read the relevant portion of section 80 itself; it provides, *inter alia*, that no suit shall be instituted against the Government until the expiration of two months next after notice in writing has been delivered to or left at the office of the authorities specified by clauses (a), (b) and (c); and it further provides that such notice shall state the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.

It would be noticed that the material words used in section 80 are wide and unambiguous; they are "express, explicit and mandatory", and it would be difficult to except from their operation any proceeding which can be regarded as a suit against the Government. While dealing with the applicability of section 80, the question to ask is: is it a suit against the Government or not? If it is, then section 80 by the very force of its words must apply. We have already referred to the provisions of Order 21, rule 63. In terms, the said rule provides that the order passed in the investigation proceedings shall be conclusive, subject to the result of a suit which the aggrieved party may institute. So, there can be no doubt that the proceedings, which the aggrieved party commences by virtue of the provisions of Order 21, rule 63, are intended to be a suit. In fact, the present proceedings have commenced with the presentation of a plaint as required by section 26 of the Code; and the very article under which the plea of limitation is raised against the appellant shows that it is a plea in respect of the institution of a suit beyond the period of limitation. It is thus plain that what we are dealing with is a suit and that it is a suit against the Union of India. Therefore, on a fair and reasonable construction of section 80, we do not see how it is possible to hold that a suit filed under Order 21, rule 63 can be taken out of the provisions of section 80 of the Code. If we were to accede to the argument urged before us by Mr. Karkhanis for the respondent, we would, in substance, have to add certain words of exception in section 80 itself, and that plainly is not permissible.

It is, however, said that the suit under Order 21, rule 63 is a continuation of attachment proceedings and as such, cannot be regarded as a suit proper which is included within the purview of section 80. In support of the assumption that a suit filed under Order 21, rule 63 is a continuation of attachment proceedings, reliance is placed on the decision of the Privy Council in *Phul Kumari v. Ghanshyam Misra*¹. In that case, the Privy Council was dealing with the question of the proper Court-fees to be paid for a suit under section 283 of the Code which was then in force, and which corresponds to Order 21, rule 63 of the present Code. Article 17 of Schedule II of the Court-Fees Act (VII of 1870) with which the Privy Council was dealing was expressly made to apply to "Plaint or Memorandum of Appeal in each of the following suits: 1. To alter or set aside a summary decision or order of any of the civil Courts not established by Letters Patent, or of any Revenue Court"; and the Privy Council had to examine the question as to whether a suit filed under section 283 for the purpose of the relevant article prescribing the Court-fee to be paid on the plaint was, or was not, a suit to alter or set aside a summary

decision or order of any civil Court. In answering this question in the affirmative, the Privy Council observed that the differences between the words used in the plaint in the case before it and the words used in the relevant article of the Court-Fees Act, was merely verbal. In the plaint, the plaintiff had "categorically asked from the Court the several decrees which she had asked from the Subordinate Judge, and which the Subordinate Judge had refused." In other words, the plaint did not, in terms, ask for the setting aside of the said decrees, or reversing them. The Privy Council did not attach any importance to this verbal difference and held that in substance, the plaint was one filed with the object of getting a summary decision of the Court set aside as contemplated by section 283. It is in that connection that the Privy Council made the observation on which reliance has been placed by the Courts below. Says the Privy Council, "Misled by the form of the action directed by section 283, both parties have treated the action as if it were not simply a form of appeal, but as if it were unrelated to any decree forming the cause of action." In other words, the effect of the observations made by the Privy Council is just this that when a suit is brought under section 283, it is no more than a suit to set aside a summary decision by which the plaintiff feels aggrieved. It would be noticed that the question which had been raised before the Privy Council had reference to the payment of proper Court-fees; and the decision of the Privy Council and its observations must, therefore, be read in the light of the article which the Privy Council applied. It would, we think, be unreasonable to extend the said observations to the present case and treat them as enunciating a proposition of law that for all purposes, a suit brought under Order 21, rule 63 is either a continuation of the objection proceedings, or is a form of an appeal against the order passed in them. In our opinion, this extension is not justified, because the Privy Council could not have intended to lay down such a broad proposition. Therefore, the argument that the present suit is outside the purview of section 80 of the Code because it is a continuation of the attachment proceedings, must be rejected.

In this connection, we ought to bear in mind that the scope of the enquiry under Order 21, rule 58 is very limited and is confined to questions of possession as therein indicated while suits brought under Order 21, rule 63 would be concerned not only with the question of possession, but also with the question of title. Thus the scope of the suit is very different from and wider than that of the investigation under Order 21, rule 58. In fact, it is the order made in the said investigation that is the cause of action of the suit under Order 21, rule 63. Therefore, it would be impossible to hold that such a suit is outside the purview of section 80 of the Code.

It is next contended that no notice can be said to be required for suits under Order 21, rule 63, because the principal object for enacting section 80 is absent in the case of such suits. The argument is that the requirement about the statutory notice prescribed by section 80 proceeds on the basis that it is desirable to give such notice to afford the Government an opportunity to consider whether the claims made against it should be settled or not. The Legislature thought that if the Government is informed beforehand about civil actions intended to be taken against it, it may in some cases avoid unnecessary litigation by accepting the claims if it is satisfied that the claims are well-founded. In the case of a suit, under Order 21, rule 63, there is hardly any need to give such a notice, because the Government was already a party in the investigation proceedings and it knows what the appellant's case was in regard to the attachment sought to be levied at its instance. Since the respondent knows all about the claim of the appellant in regard to the properties in question, it is futile and unnecessary to require that a notice should be given to the respondent before a suit can be filed by the appellant under Order 21, rule 63.

In support of this argument, Mr. Kaikhanis has relied on a decision of this Court in *Amar Nath Dogra v. Union of India*¹. In that case, one of the questions which the Court had to consider was whether, if a suit against the Government is withdrawn and a subsequent suit is filed substantially on the same cause of action, the notice given by the plaintiff prior to the institution of the first suit, could be said

1. (1963), 1 S.C.R. 657. A.I.R. 1963 S.C. 424.

to satisfy the requirements of section 80 of the Code in respect of the second suit ; and this question was answered in the affirmative. While upholding the appellant's contention that the first notice should serve to meet the requirements of section 80, this Court, no doubt, observed that the main purpose of giving the notice is to give previous intimation to the Government about the nature of the claim which a party wants to make against it. But we do not see how the purpose or the reason of requiring the notice can alter the effect of the plain words used in section 80. What this Court held in the case of *Amar Nath Dogra*¹ was that the notice given before the institution of the first suit can be said to be a good notice even for the second suit ; and that means that the notice was necessary to be given under section 80, but it was not necessary to repeat it in the circumstances of the case.

It is significant that in a large majority of cases, the plea that the Government raises is that notice is necessary and it is generally contended that the notice being defective in one particular or another, makes the suit incompetent, and in dealing with such pleas, the Courts have naturally sought to interpret the notices somewhat liberally and have sometimes observed that in enforcing the provisions of section 80, common sense and sense of propriety should determine the issue. It is very unusual for the Government to contend that in a suit brought against it, no notice is required under section 80. It is plain that such a plea has been raised by the respondent in the present case, because it helps the respondent to defeat the appellant's claim on the ground of limitation. In any case, the contention based on the object or purpose of the notice can hardly assist us in interpreting the plain words of section 80.

It will be recalled that prior to the decision of the Privy Council in *Bhagchand Dagadusa and others v. Secretary of State for India in Council and others*² there was a sharp difference of opinion among the Indian High Courts on the question as to whether section 80 applied to suits where injunction was claimed. The Privy Council held that section 80 applied "to all forms of suits and whatever the relief sought, including a suit for an injunction." In dealing with the question about the construction of section 80, the Privy Council took notice of the fact that some of the decisions which attempted to exclude from the purview of section 80 suits for injunction, were influenced by the "assumption as to the practical objects with which it was framed." They also proceeded on the basis that section 80 was a rule of procedure and that any construction which may lead to injustice is one which ought not to be adopted, since it would be repugnant to the notion of justice. Having noticed these grounds on which an attempt was judicially made to except from the purview of section 80 suits, for instance, in which injunction was claimed, Viscount Sumner, who spoke for the Privy Council, observed that "the Act, albeit a Procedure Code, must be read in accordance with the natural meaning of its words," and he added that "section 80 is express, explicit and mandatory, and it admits of no implications, or exceptions." That is why it was held that a suit in which an injunction is prayed is still a suit within the words of the section, and to read any qualification into it is an encroachment on the function of legislation. In our opinion, these observations apply with equal force in dealing with the question as to whether a suit under Order 21, rule 63 is outside the purview of section 80 of the Code.

It appears that on this question, there has been a divergence of judicial opinion in India. But, in our opinion, the view that suits under Order 21, rule 63 did not attract the provisions of section 80, is inconsistent with the plain, categorical and unambiguous words used by it.

The result is, the appeal is allowed, the decree passed by the Courts below is set aside and the suit is remanded to the trial Court for disposal in accordance with law. The appellant would be entitled to his costs from the respondent in this Court and in the High Court. Costs in the trial Court would be costs in the suit.

V.K.

Appeal allowed.

1. (1963) 1 S.C.R. 657 : A.I.R. 1963 S.C. 424. A.I.R. 1927 P.C. 176.

2. (1927) L.R. 54 I.A. 338 : 53 M.L.J. 81 :

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT:—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYA TULLAH, R. S. BACHAWAT AND V. RAMASWAMI, JJ.

K. Ananda Nambiar and another

... *Petitioners**

v.

The Chief Secretary to the Government of Madras and others (in both the petitions)

.. *Respondents*

The State of Punjab and others

.. *Interveners.*

Constitution of India (1950), Articles 77 (2) and 359—Order of President, dated 3rd November, 1962, as amended on 11th November, 1962 and issued under Article 359 (1)—Validity and effect—Petition under Article 32 of the Constitution of India challenging a detention order on ground that rule 30 (1) (b) of the Defence of India Rules (1962) under which the order is made is invalid, or on the ground that the detention order was made mala fide—If barred.

Defence of India Rules (1962), Rule 30 (1) (b)—If invalid in so far as it permits a Member of Parliament to be detained.

Constitution of India (1950), Articles 79, 85 (1), 86 (1), 100 (1) and 105—Scope.

The order of the President of India, dated 3rd November, 1962 as amended on 11th November, 1962 and made in exercise of the powers conferred by Article 359 (1) of the Constitution of India (hereinafter referred to as the Presidential Order) has been issued in accordance with the provisions of Article 77 (2) and is valid. The argument that the order made by the President by virtue of the powers conferred on him by Article 359 (1) is not an executive order of the Government of India and as such Article 77 (2) would not apply, is untenable. Besides, Article 359 (3) itself requires that every order made under clause (1) shall, as soon as may be after it is made, be laid before each House of Parliament and it is not alleged that this has not been done in the case of the Presidential Order, dated 3rd November, 1962. The order of the President, dated 3rd November, 1962 as amended on 11th November, 1962 is therefore a valid order.

In construing the effect of the Presidential Order, it is necessary to bear in mind the general rule of construction that where an order purports to suspend the fundamental rights guaranteed to the citizens by the Constitution, the said order must be strictly construed in favour of the citizens' Fundamental Rights. It will be noticed that the sweep of the Presidential Order is limited by its last clause. This order can be invoked only in cases where persons have been deprived of their rights under Articles 14, 21 and 22 of the Constitution of India under the Defence of India Ordinance (1962) or any rule or order made thereunder. In other words, if the said Fundamental Rights of citizens are taken away otherwise than under the Defence of India Ordinance or Rules or Orders made thereunder, the Presidential Order will not come into operation. The other limitation is that the Presidential Order will remain in operation only so long as the Proclamation of Emergency is in force. When these two conditions are satisfied, the citizen's right to move the Supreme Court for the enforcement of his rights conferred by Articles 14, 21 and 22 is no doubt suspended; and that must mean that if the citizen wants to enforce those rights by challenging the validity of the order of his detention, his right to move the Supreme Court would be suspended in so far as he seeks to enforce the said rights.

But it is obvious that what the last clause of the Presidential Order postulates is that the Defence of India Ordinance or any Rule or Order made thereunder is valid. It is true that during the pendency of the Presidential Order, the validity of the Ordinance, rule or order made thereunder cannot be questioned on the ground that they contravene Articles 14, 21 and 22 of the Constitution of India; but this limitation will not preclude a citizen from challenging the validity of the Ordinance, Rule or Order made thereunder on any other ground. If the petitioner seeks to challenge the validity of the Ordinance, Rule or Order made thereunder on any ground other than the contravention of Articles 14, 21 and 22, the Presidential Order cannot come into operation. The challenge to the Ordinance, Rule or Order made thereunder cannot also be raised on the ground of the contravention of Article 19 of the Constitution, because as soon as a Proclamation of Emergency is issued by the President, under Article 358 the provisions of Article 19 are automatically suspended. But if a challenge is made to the validity of the Defence of India Ordinance, Rule or Order made thereunder on a ground

other than those covered by Article 358 or the Presidential Order issued under Article 359 (1) such a challenge is outside the purview of the Presidential Order; and if a petition is filed by a citizen under Article 32 on the basis of such a challenge, it cannot be said to be barred, because such a challenge is not covered by the Presidential Order at all. Similarly if a detenu, who is detained under an order passed under Rule 30 (1) (b) of the Defence of India Rules 1962, contends that the said order has been passed by a delegate outside the authority conferred on him by the appropriate Government under section 40 of the Defence of India Act, or it has been exercised inconsistently with the conditions prescribed in that behalf, a preliminary bar against the competence of the detenu's petition cannot be raised under the Presidential Order, because the last clause of the Presidential Order would not cover such a petition.

Thus, a petition under Article 32 of the Constitution of India challenging a detention order on the ground that rule 30 (1) (b) of the Defence of India Rules (1962) under which the detention order is made is invalid on grounds other than those based on Articles 14, 19, 21 or 22 of the Constitution of India or on the ground that the order of detention was passed *mala fide*, would not be barred by the Presidential Order, dated 3rd November, 1962 as amended on 11th November, 1962.

So far as a valid order of detention is concerned a Member of Parliament can claim no special status higher than that of an ordinary citizen and is as much liable to be arrested and detained under it as any other citizen. The validity of rule 30 (1) (b) of the Defence of India Rules (1962) cannot therefore be challenged on the ground that it permits an order of detention in respect of a Member of Parliament and as a result of the said order the Member of Parliament cannot participate in the business of Parliament.

The argument that the rights conferred by Articles 79, 85 (1) 86 (1), 100 (1) and 105 (1) and (2) of the Constitution of India on a Member of Parliament to function as such member, to participate in the business of the House, to take part in the debate and to record his vote are his constitutional or even fundamental rights which cannot be contravened by any law, is not acceptable. The rights conferred by the various Articles mentioned above are not rights which can properly be described as constitutional or fundamental rights; nor are they rights of Members of Parliament. Article 79 deals with the constitution of Parliament and it has nothing to do with the individual rights of the Member of Parliament after they are elected. Articles 85 and 86 confer on the President the power to issue summons for the ensuing session of Parliament and to address either House of Parliament or both Houses as therein specified. These Articles cannot be construed to confer any right as such on individual Members or impose any obligation on them. It is not as if a Member of Parliament is bound to attend the session, or is under an obligation to be present in the House when the President addresses it. The context in which these Articles appear shows that the subject-matter of these Articles is not the individual rights of the Members of Parliament, but they refer to the right of the President to issue summons for the ensuing session of Parliament or to address the House or Houses. Similarly what Article 100 (1) provides is the manner in which questions will be determined and it is not easy to see how the provisions that all questions shall be determined by a majority of votes of Members present and voting can give rise to a constitutional right as such. The freedom of speech conferred by Article 105 (1) and (2) is no doubt a privilege of very great importance and significance, but the right is given only when the Members attend the session of the House and deliver speech within the chamber itself. If the order of detention validly prevents a Member from attending a session of Parliament, no occasion arises for the exercise of the right of freedom of speech and no complaint can be made that the said right has been invalidly invaded. Besides, the freedom of speech conferred by Article 105 (1) and (2) is part of the privileges of the Members of Parliament under Article 105 and it is well-settled that a claim for freedom from arrest by a detention order cannot be sustained under Article 105 of the Constitution of India.

Consequently rule 30 (1) (b) of the Defence of India Rules (1962) in so far as it permits detention of a Member of Parliament does not contravene any of his fundamental or constitutional rights and is therefore valid.

On merits, there is no substance in the grievance that the orders of detention in the instant case passed against the petitioners were made either *mala fide* or without the proper satisfaction of the detaining authority.

Petition under Article 32 of the Constitution of India for enforcement of Fundamental Rights.

M. C. Setalvad and *N. C. Chatterjee*, Senior Advocates, (*M.R.K. Pillai*, Advocate, and *R. K. Garg*, *S. C. Agarwala*, *D.P. Singh* and *M. K. Ramamurthi*, Advocates of *M/s. M. K. Ramamurthi & Co.*, with them), for Petitioner (In W.P. No. 47 of 1965).

R.K. Garg, *S.C. Agarwala*, *D.P. Singh* and *M. K. Ramamurthi*, Advocates of *M/s. M. K. Ramamurthi & Co.*, for Petitioner (In W.P. No. 61 of 1965).

N. Krishnaswami Reddy, Advocate-General for the State of Madras, (*V.P. Raman* and *A. V. Rangam*, Advocates with him), for Respondent No. 1. (In both the petitions).

Niren De, Additional Solicitor-General of India and *N. S. Bindra*, Senior Advocate (*B.R.G.K. Achar* and *R. N. Sachthey*, Advocates, with them), for Respondent No. 2 (In both the petitions).

L. D. Kaushal, Senior Deputy Advocate-General for the State of Punjab (*R. N. Sachthey*, Advocate, with him), for Intervener No. 1.

U.P. Singh, Advocate, for State of Bihar and Union Territory of Tripura.

R. K. Garg, *S.C. Agarwala*, *D. P. Singh* and *M. K. Ramamurthi*, Advocates of *M/s. M. K. Ramamurthi & Co.*, for Intervener (*Makhan Singh Tarsikka*).

Veerappa and *Hardev Singh*, Advocates, for Interveners (*Satwant Singh* and 12 others).

All the other Interveners in person.

The Judgment of the Court was delivered by :

Gajendragadkar, C.J.—Mr. K. Ananda Nambiar, who is a Member of Parliament, has been detained by the Government of Madras since the 30th December, 1964. On the 29th December, 1964, an order was passed under Rule 30 (1) (b) and (4) of the Defence of India Rules, 1962 in which it was stated that the Government of Madras were satisfied with respect to the petitioner K. Ananda Nambiar that with a view to preventing him from acting in any manner prejudicial to the Defence of India and the public safety, it was necessary to make an order directing that he be detained. The said order further directed that the petitioner should be arrested by the police wherever found and detained in the Central Jail, Tiruchirapalli. Though this order directed the detention of the petitioner in the Central Jail, Tiruchirapalli, it is common ground that he has been detained in fact in the Central Jail, Cuddalore. By his present writ petition (No. 47 of 1965) filed under Article 32 of the Constitution, the petitioner challenges the validity of the said order of detention mainly on two grounds. He contends that Rule 30 (1) (b) under which the impugned order has been passed is invalid, and in the alternative, he argues that the impugned order is not valid, because it has been passed *mala fide* and is otherwise not justified by the relevant Rules.

Mr. R. Umanath, who is also a Member of Parliament, has been similarly detained by the order passed by the Government of Madras on the 29th December, 1964 and in the same terms. He has also been detained not in the Central Jail, Tiruchirapalli, as mentioned in the order, but in the Central Jail, Cuddalore, since the 30th December, 1964. By his writ petition (No. 61 of 1965), the petitioner Umanath has raised the same points before us. Mr. Setalvad has argued the first point of law about the invalidity of the relevant Rule, whereas Mr. Chatterjee has argued the other point relating to the invalidity of the impugned orders, on behalf of both the petitioners. To these two petitions are impleaded respondent No. 1 the Chief Secretary, Government of Madras, respondent No. 2, the Superintendent, Central Jail, Cuddalore; and respondent No. 3, the Union of India.

Before proceeding to deal with the points raised by the petitioners, it is necessary to consider the preliminary objection which has been urged before us by the learned Additional Solicitor-General who has appeared for respondent No. 3. He contends that the writ petitions are incompetent in view of the Order issued by the President on the 3rd November, 1962. It will be recalled that on the 26th October,

1962, the President issued a Proclamation of Emergency in exercise of the powers conferred on him by clause (1) of Article 352 of the Constitution. This proclamation declared that a grave emergency existed whereby the security of India was threatened by external aggression. Thereafter, two orders were issued by the President, one on the 3rd November, 1962 and the other on the 11th November, 1962, in exercise of the powers conferred by clause (1) of Article 359 of the Constitution. The first Order as amended by the later Order reads thus :—

“In exercise of the powers conferred by clause (1) of Article 359 of the Constitution, the President hereby declares that the right of any person to move any Court for the enforcement of the rights conferred by Articles 14, 21 and 22 of the Constitution shall remain suspended for the period during which the Proclamation of Emergency issued under clause (1) of Article 352 thereof on the 26th October, 1962, is in force, if such person has been deprived of any such rights under the Defence of India Ordinance, 1962 (IV of 1962) or any Rule or Order made thereunder.”

It may be added at this stage that Ordinance IV of 1962 later became an Act called ‘The Defence of India Act, 1962 (LI of 1962)’. The argument is that the petitioners are admittedly detained under Rule 30 (1) (b) of the Defence of India Rules, and so, the said Presidential Order is inevitably attracted; and that means that the petitioners’ right to move this Court under Article 32 is suspended during the pendency of the Proclamation of Emergency.

We are not impressed by this argument. In construing the effect of the Presidential Order, it is necessary to bear in mind the general rule of construction that where an Order purports to suspend the fundamental rights guaranteed to the citizens by the Constitution, the said Order must be strictly construed in favour of the citizens’ fundamental rights. It will be noticed that the sweep of the Order is limited by its last clause. This Order can be invoked only in cases where persons have been deprived of their rights under Articles 14, 21 and 22 under the Defence of India Ordinance or any Rule or Order made thereunder. In other words, if the said fundamental rights of citizens are taken away otherwise than under the Defence of India Ordinance or Rules or Orders made thereunder, the Presidential Order will not come into operation. The other limitation is that the Presidential Order will remain in operation only so long as the Proclamation of Emergency is in force. When these two conditions are satisfied, the citizen’s right to move this Court for the enforcement of his rights conferred by Articles 14, 21 and 22 is no doubt suspended; and that must mean that if the citizen wants to enforce those rights by challenging the validity of the order of his detention, his right to move this Court would be suspended in so far as he seeks to enforce the said rights.

But it is obvious that what the last clause of the Presidential Order postulates is that the Defence of India Ordinance or any Rule or Order made thereunder is valid. It is true that during the pendency of the Presidential Order, the validity of the Ordinance, Rule or Order made thereunder cannot be questioned on the ground that they contravene Articles 14, 21 and 22; but this limitation will not preclude a citizen from challenging the validity of the Ordinance, Rule or Order made thereunder on any other ground. If the petitioner seeks to challenge the validity of the Ordinance, Rule or Order made thereunder on any ground other than the contravention of Articles 14, 21 and 22, the Presidential Order cannot come into operation. In this connection, we ought to add that the challenge to the Ordinance Rule or Order made thereunder cannot also be raised on the ground of the contravention of Article 19, because as soon as a Proclamation of Emergency is issued by the President, under Article 358 the provisions of Article 19 are automatically suspended. But the point still remains that if a challenge is made to the validity of the Ordinance, Rule or Order made thereunder on a ground other than those covered by Article 358, or the Presidential Order issued under Article 359 (1), such a challenge is outside the purview of the Presidential Order; and if a petition is filed by a citizen under Article 32 on the basis of such a challenge, it cannot be said to be barred, because such a challenge is not covered by the Presidential Order at all.

In *Makhan Singh Tarsikka v. The State of Punjab*¹, a Special Bench of this Court has had occasion to consider the effect of the Proclamation of Emergency issued by the President and the Presidential Order with which we are concerned in the present writ petitions. In that case, it was held that the sweep of Article 359 (1) and the Presidential Order issued under it is wide enough to include all claims made by citizens in any Court of competent jurisdiction when it is shown that the said claims cannot be effectively adjudicated upon without examining the question as to whether the citizen, is, in substance, seeking to enforce any of the specified fundamental rights and that means the fundamental rights under Articles 14, 19, 21 and 22. Even so, this Court, took the precaution of pointing out that as a result of the issue of the Proclamation of Emergency and the Presidential Order, a citizen would not be deprived of his right to move the appropriate Court for a writ of *habeas corpus* on the ground that his detention has been ordered *mala fide*. Similarly it was pointed out that if a detenu contends that the operative provisions of the Defence of India Ordinance under which he is detained suffer from the vice of excessive delegation, the plea thus raised by the detenu cannot, at the threshold, be said to be barred by the Presidential Order; because, in terms, it is not a plea which is relateable to the fundamental rights specified in the said Order.

Let us refer to two other pleas which may not fall within the purview of the Presidential Order. If the detenu, who is detained under an order passed under Rule 30 (1) (b) contends that the said Order has been passed by a delegate outside the authority conferred on him by the appropriate Government under section 40 of the Defence of India Act, or it has been exercised inconsistently with the conditions prescribed in that behalf a preliminary bar against the competence of the detenu's petition cannot be raised under the Presidential Order, because the last clause of the Presidential Order would not cover such a petition, and there is no doubt that unless the case falls under the last clause of the Presidential Order, the bar created by it cannot be successfully invoked against a detenu. Therefore, our conclusion is, that the learned Additional Solicitor-General is not justified in contending that the present petitions are incompetent under Article 32 because of the Presidential Order. The petitioners contend that the relevant rule under which the impugned orders of detention have been passed, is invalid on grounds other than those based on Articles 14, 19, 21 and 22; and if that plea is well-founded, the last clause of the Presidential Order is not satisfied and the bar created by it suspending the citizens fundamental rights under Articles 14, 21 and 22 cannot be pressed into service.

That takes us to the merits of Mr. Setalvad's contention that Rule 30 (1) (b) of the Defence of India Rules is invalid. The rule in question has been framed under section 3 (2) (15) of the Defence of India Act, and in that sense it can be said, *prima facie*, to be justified by the said provision. But Mr. Setalvad argues that in so far as it permits a Member of Parliament to be detained, it contravenes that Constitutional right of Members of Parliament. According to Mr. Setalvad, a Member of Parliament, like a Member of any of the State Legislatures, has constitutional rights to function as such Member and to participate in the business of the House to which he belongs. He is entitled to attend every session of Parliament, to take part in the debate, and to record his vote. So long as a Member of Parliament is qualified to be such Member, no law can validly take away his right to function as such Member. The right to participate in the business of the legislative chamber to which he belongs, is described by Mr. Setalvad as his constitutional right, and he urges that this constitutional right of a legislator can be regarded as his fundamental right; and inasmuch as the relevant rule authorises the detention of a legislator preventing him from exercising such right, the rule is invalid. In the alternative, Mr. Setalvad contends that the rule should be treated as valid in regard to persons other than those who are Members of Legislatures, and in that sense, the part of it which touches the Members of Legislatures, should be severed from the part which affects other citizens and the invalid part should be

uck down. This argument again proceeds on the same basis that a legislator not be validly detained so as to prevent him from exercising his rights as such legislator while the legislative chamber to which he belongs is in session. On the one basis, Mr. Setalvad has urged another argument and suggested that we should construe the Rule as not to apply to legislators. It would be noticed that the common basis of all these alternative arguments is the assumption that legislators have certain constitutional rights which cannot be validly taken away by any statute or statutory rule.

In support of this argument, Mr. Setalvad has referred us to certain constitutional provisions. The first Article on which he relies is Article 245 (1). This article provides that subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State. The argument is that the power to make laws is subject to the provisions of the Constitution and that, if there are any constitutional rights which the legislator can claim, no law can be validly passed to take away the said rights. In other words, just as the validity of any law can be challenged on the ground that it contravenes the fundamental rights guaranteed by Article 19, so can the validity of the impugned Rule be challenged on the ground that it contravenes the constitutional-cum-fundamental rights of the legislators.

These constitutional rights, according to Mr. Setalvad, are to be found in several articles of the Constitution. Mr. Setalvad's argument begins with Article 79. This article deals with the constitution of Parliament; it provides that Parliament of the Union shall consist of the President and two Houses to be known respectively as the Council of States and the House of the People. Article 85 (1) provides, *inter alia*, that the President shall from time to time summon each House of Parliament to meet at such time and place as he thinks fit. In accordance with the provisions of this article, when the President decides to call for the session of Parliament, summons are issued under his directions asking all Members of Parliament to attend the ensuing session. The petitioner Ananda Nambiar received such a summons issued on the 9th January, 1965. Article 86 (1) gives the President the right to address either House of Parliament or both Houses assembled together; and it provides that for that purpose, the President shall require the attendance of members. Mr. Setalvad argues that when a summons is issued by the President requiring the member to attend the ensuing session of Parliament, it is not only his right, but a constitutional obligation to attend the session and hear the speech of the President. Article 100 (1) refers to the voting in the Houses, and it provides that save otherwise provided in this Constitution, all questions at any sitting of either House or joint sitting of the Houses shall be determined by a majority of votes of members present and voting, other than the Speaker or person acting as Chairman or Speaker. Article 101 (4) provides that if for a period of sixty days a member of either House of Parliament is, without permission of the House, absent from meetings thereof, the House may declare his seat vacant. It is common ground that if a member is detained or otherwise prevented from attending the session of the House for personal reasons, he asks for permission of the House and usually, such permission is granted. Article 105 deals with the powers, privileges and immunities of Parliament and its Members. Mr. Setalvad strongly relies on the provisions of sub-articles (1) and (2) of Article 105 which deal with the freedom of speech inside the House of Parliament, and confer absolute immunity on the Members of Parliament in respect of their speeches and votes. If the order of detention prevents a Member of Parliament from attending the session of Parliament, from participating in the debate and from giving his vote, that amounts to a violation of constitutional rights; that, in substance, is Mr. Setalvad's argument.

Mr. Setalvad also relied on the fact that this right continues to vest in the Member of Parliament during the life of the Parliament unless he is disqualified under Article 102 or under section 7 (b) of the Representation of the People Act, 1951 (LII of 1951). Article 84 deals with the qualification for membership of Parlia-

ment. With the provisions of this article we are not concerned in the present proceedings, because we are dealing with the rights of persons who have already been elected to the Parliament—in other words, who possess the qualifications prescribed by Article 84. Article 102 prescribes disqualifications for membership; it provides, *inter alia*, that a person shall be disqualified for being a member of either House of Parliament if his case falls under any of its clauses (a) to (e). This disqualification applies for being chosen or for being a member of either House of Parliament. In other words, if a person incurs the disqualification prescribed by the relevant clauses of Article 102 (1) after he is elected to either House of Parliament, he will cease to be such a Member as a result of the said disqualification. If a disqualification is not incurred as prescribed by Article 102 (1), he is entitled to continue to be a member of the House during its life. Section 7 of the Representation of the People Act prescribes disqualifications for membership of Parliament or of a State Legislature. Section 7 (b) is relevant for our purpose. It provides that a person shall be disqualified for being chosen as, and for being, a member of either House of Parliament if, whether before or after the commencement of the Constitution, he has been convicted by a Court in India of any offence and sentenced to imprisonment for not less than two years, unless a period of five years, or such less period as the Election Commission may allow in any particular case, has elapsed since his release. The argument based on the provisions of section 7 is the same as the argument based on the provisions of Article 102. If a Member of Parliament incurs a disqualification, he may cease to be such member, but if he continues to be qualified to be a member, his constitutional rights cannot be taken away by any law or order.

It will be noticed that in substance the claim made is one of exemption from arrest under a detention order and, *prima facie*, such a claim would normally and legitimately fall under Article 105 (3) of the Constitution. Article 105 (3) deals with the powers, privileges and immunities of Parliament and its Members, and it provides that in other respects, the powers, privileges and immunities of each House of Parliament, and of the Members and the Committees of each House, shall be such as may from time to time be defined by parliament by law and, until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom, and of its Members and Committees, at the commencement of this Constitution. But Mr. Setalvad expressly stated before us that he did not rest his case on the provisions of Article 105 (3) and that obviously is for the very good reason that freedom from arrest under a detention order is not recognised as a privilege which can be claimed by Members of House of Commons in England. It is because such a claim cannot be based on the provisions of Article 105 (3) that Mr. Setalvad has been driven to adopt the ingenious course of suggesting that the rights of the Members of Parliament to participate in the business of Parliament is a constitutional and even a fundamental right which cannot be contravened by a law. The narrow question which thus falls to be considered on this contention is: if a claim for freedom from arrest by a detention order cannot be sustained under the privileges of the Members of Parliament, can it be sustained on the ground that it is a constitutional right which cannot be contravened? Before dealing with this point, it is necessary to indicate broadly the position about the privileges of the Members of the Indian Legislatures, because they will materially assist us in determining the validity of the contention raised before us by Mr. Setalvad. It is common ground that the privileges, powers and immunities of the Members of the Indian Legislatures are the same as those of the Members of the House of Commons as they existed at the commencement of the Indian Constitution. Let us, therefore, see what was the position about the privileges of the Members of the House of Commons in regard to freedom from arrest by a detention order.

The position about the privileges of the Members of the House of Commons in regard to preventive detention is well settled. In this connection, Erskine May observes:

"The privilege of freedom from arrest is limited to civil causes, and has not been allowed to interfere with the administration of criminal justice or emergency legislation."

"In early times the distinction between "civil" and "criminal" was not clearly expressed. It was only to cases of "treason, felony and breach (or surety) of the peace" privilege was explicitly held not to apply. Originally the classification may have been regarded as sufficiently comprehensive. But in the case of misdemeanours in the growing list of statutory offences, and, particularly, in the case of preventive detention under emergency legislation in times of crisis, there was a debatable region about which neither House had until recently expressed a definite view. The development of privilege has shown a tendency to confine it more narrowly to cases of a civil character and to exclude not only every kind of criminal cases, but also cases which, while not strictly criminal, partake more of a criminal than of a civil character. This development is in conformity with the principle laid down by the Commons in a conference with the Lords in 1641: "Privilege of Parliament is granted in regard of the service of the Commonwealth and is not to be used to the danger of the Commonwealth."

The last statement of May is based on the report of the Committee of Privileges of the House of Commons which dealt with the case of the detention of Captain Ramsay under Regulation 18-B of the Defence (General) Regulations, 1939. Captain Ramsay who had been detained under the said Regulation, urged before the Committee of Privileges that by reason of the said detention, a breach of the privileges of the House had been committed. This plea was rejected by the Committee of Privileges. The Committee found that Regulation 18-B under which Captain Ramsay had been detained, had been made under section 1 (2) (a) of the Emergency Powers (Defence) Act, 1939. It examined the question as to whether the arrest and detention of Captain Ramsay were within the powers of the Regulation and in accordance with its provisions; and it was satisfied that they were within the powers of the Regulation and in accordance with its provisions. The Committee then examined several precedents on which Captain Ramsay relied, and it found that whereas arrest in civil proceedings is a breach of privilege, arrest on a criminal charge for an indictable offence is not. The Committee then examined the basis of the privilege and the reason for the distinction between arrest in a civil suit and arrest on a criminal charge. It appeared to the Committee that the privilege of freedom from arrest originated at a time when English Law made free use of imprisonment in civil proceedings as a method of coercing debtors to pay their debts; and in order to enable the Members of Parliament to discharge their functions effectively, it was thought necessary to grant them immunity from such arrest, because they were doing King's business and should not be hindered in carrying out their business by arrest at the suit of another subject of the King. Criminal acts, however, were offences against the King, and the privilege did not apply to arrest for such acts. In this connection, the Committee emphasised the fact that consideration of the general history of the privilege showed that the tendency had been to narrow its scope. The Committee recognised that there was a substantial difference between arrest and subsequent imprisonment on a criminal charge and detention without trial by executive order under the Regulation or under analogous provisions in the past. It, however, observed that they have this in common that the purpose of both was the protection of the community as a whole, and in that sense, arrest in the course of civil proceedings, on principle, was wholly different from arrest on a criminal charge or arrest for the purpose of detention. It is on these grounds that the Committee came to the conclusion that the detention of Captain Ramsay did not amount to any infringement of his privilege of freedom of speech.

A similar question had arisen in India in 1952. It appears that in the early hours of the morning of the 27th May, 1952, Mr. V. G. Deshpande, who was then a Member of Parliament, was arrested and detained under the Preventive Detention Act, 1950; the House was then in session; and a question was raised that the said arrest and detention of Mr. Deshpande, when the House was in session, amounted to a breach of the privilege of the House. The question thus raised was referred to the Committee of Privileges for its report. On the 9th July, 1952, the report made by the said Committee was submitted to the House. The majority view of the Committee was that the arrest of Mr. Deshpande under the Preventive Detention Act

did not constitute a breach of the privilege of the House. In coming to this conclusion, the majority view rested itself primarily on the decision of the Committee of Privileges of the House of Commons in the case of Captain Ramsay. It is thus plain that the validity of the arrest of the petitioners in the present proceedings cannot be effectively challenged by taking recourse to any of the provisions of Article 105. That is why Mr. Setalvad naturally did not and could not press his case under the said Article.

What then is the true legal character of the rights on which Mr. Setalvad has founded his argument? They are not rights which can be properly described as constitutional rights of the Members of Parliament at all. The Articles on which Mr. Setalvad has rested his case clearly bring out this position. Article 79 deals with the constitution of Parliament and it has nothing to do with the individual rights of the Members of Parliament after they are elected. Articles 85 and 86 confer on the President the power to issue summons for the ensuing session of Parliament and to address either House of Parliament or both Houses as there in specified. These Articles cannot be construed to confer any right as such on individual Members or impose any obligation on them. It is not as if a Member of Parliament is bound to attend the session, or is under an obligation to be present in the House when the President addresses it. The context in which these Articles appear show that the subject-matter of these Articles is not the individual rights of the Members of Parliament, but they refer to the right of the President to issue a summons for the ensuing session of Parliament or to address the House or Houses.

Then as to Article 100 (1), what it provides is the manner in which questions will be determined; and it is not easy to see how the provision that all questions shall be determined by a majority of votes of Members present and voting, can give rise to a constitutional right as such. The freedom of speech on which Mr. Setalvad lays considerable emphasis by reference to Article 105 (1) and (2), is a part of the privileges of the Members of the House. It is no doubt a privilege of very great importance and significance, because the basis of democratic form of Government is that Members of Legislatures must be given absolute freedom of expression when matters brought before the Legislatures are debated. Undoubtedly, the Members of Parliament have the privilege of freedom of speech, but that is only when they attend the session of the House and deliver their speech within the chamber itself. It will be recalled that in Captain Ramsay's case, what had been urged before the Committee of Privileges was that the detention of Captain Ramsay had caused a breach of privilege of his freedom of speech, and this plea was rejected by the Committee. We are, therefore, satisfied that on a close examination of the Articles on which Mr. Setalvad has relied, the whole basis of his argument breaks down, because the rights which he calls constitutional rights are rights accruing to the Members of Parliament after they are elected, but they are not constitutional rights in the strict sense, and quite clearly, they are not fundamental rights at all. It may be that sometimes in discussing the significance or importance of the right of freedom of speech guaranteed by Article 105 (1) and (2), it may have been described as a fundamental right; but the totality of rights on which Mr. Setalvad relies cannot claim the status of fundamental rights at all, and the freedom of speech on which so much reliance is placed, is a part of the privileges falling under Article 105, and the plea that a breach has been committed of any of these privileges cannot, of course, be raised in view of the decision of the Committee of Privileges of the House of Commons to which we have just referred. Besides, the freedom of speech to which Article 105 (1) and (2) refer, would be available to a Member of Parliament when he attends the session of the Parliament. If the order of detention validly prevents him from attending a session of Parliament, no occasion arises for the exercise of the right of freedom of speech and no complaint can be made that the said right has been invalidly invaded.

There is another aspect of this problem to which we would like to refer at this stage. Mr. Setalvad has urged that a Member of Parliament is entitled to exercise

all his constitutional rights as such Member, unless he is disqualified and for the relevant disqualifications, he has referred to the provisions of Article 102 of the Constitution and section 7 of the Representation of the People Act. Let us take a case falling under section 7 (b) of this Act. It will be recalled that section 7 (b) provides that if a person is convicted of any offence and sentenced to imprisonment for not less than two years, he would be disqualified for membership, unless a period of five years, or such less period as the Election Commission may allow in any particular case, has elapsed since his release. If a person is convicted of an offence and sentenced to less than two years, clearly such conviction and sentence would not entail disqualification. Can it be said that a person who has been convicted of an offence and sentenced to suffer imprisonment for less than two years, is entitled to claim that notwithstanding the said order of conviction and sentence, he should be permitted to exercise his right as a legislator, because his conviction and sentence do not involve disqualification? It is true that the conviction of a person at the end of a trial is different from the detention of a person without a trial; but so far as their impact on the alleged constitutional rights of the Members of Parliament is concerned, there can be no distinction. If a person who is convicted and sentenced, has necessarily to forego his right of participating in the business of the Legislature to which he belongs, because he is convicted and sentenced, it would follow that a person who is detained must likewise forego his right to participate in the business of the Legislature. Therefore, the argument that so long as the Member of Parliament has not incurred any disqualification, he is entitled to exercise his rights as such Member, cannot be accepted.

Besides, if the right on which the whole argument is based is not a fundamental right, it would be different to see how the validity of the Rule can be challenged on the ground that it permits an order of detention in respect of a Member of Parliament and as a result of the said order the Member of Parliament cannot participate in the business of Parliament. It appears that a similar question had arisen before the Madras and the Calcutta High Courts, and the decisions of these High Courts are in accord with the view which we are inclined to take in the present proceedings. In *Pallamarri Venkateswarlu v. The District Magistrate, Guntur and another*¹, it was held by a Division Bench of the Madras High Court that a Member of the State Legislature cannot have immunity from arrest in the case of a Preventive Detention Order. Similarly, in the case of *K. Ananda Nambiar In re*², it was held by the Madras High Court that once a Member of a Legislative Assembly is arrested and lawfully detained, though without actual trial, under any Preventive Detention Act, there can be no doubt that under the law as it stands, he cannot be permitted to attend the sittings of the House. The true constitutional position therefore, is that so far as a valid order of detention is concerned, a Member of Parliament can claim no special status higher than that of an ordinary citizen and is as much liable to be arrested and detained under it as any other citizen.

In *Ansumali Majumdar v. The State*³, the Calcutta High Court has elaborately considered this point and has held that a member of the House of the Central or State Legislature cannot claim as such member any immunity from arrest under the Preventive Detention Act. Dealing with the argument that a Member of Parliament cannot, by reason of his detention be prevented from exercising his rights as such Member, Harries, C.J., observed that if this argument is sound, it follows that persons convicted of certain offences and duly elected must be allowed to perform their duties and cannot be made to serve their sentence during the life of a Parliament. We ought to add that in all these cases, the learned Judges took notice of the fact that freedom from criminal arrest was not treated as constituting a privilege of the Members of the House of Commons in England. Therefore,

1. (1950) 2 M.L.J. 207 : A.I.R. 1951 Mad. 269 : (1951) I.L.R. (Mad.) 135.
 2. (1952) 1 M.L.J. 1 : A.I.R. 1952 Mad. 117 : Cal. 632.
 3. (1953) 1 I.L.R. (Cal.) 93.
 3. (1953) 1 I.L.R. Cal. 272 : A.I.R. 1952

we are satisfied that Mr. Setalvad is not right in contending that Rule 30 (1) (b) is invalid.

It now remains to consider the other grounds on which Mr. Chatterjee has challenged the validity of the impugned orders of detention. The first contention raised by Mr. Chatterjee is that the Presidential Order itself is invalid. This Order has been issued in accordance with the provisions of Article 77 (2) of the Constitution. Mr. Chatterjee, however, contends that the Order issued by the President by virtue of the power conferred on him by Article 359 (1) is not an executive action of the Government of India and as such Article 77 would not apply. We are not impressed by this argument. In our opinion, Article 77 (2) which refers to order and other instruments made and executed in the name of the President is wide enough to include the present Order.

Besides, it is significant that Article 359 (3) itself requires that every order made under clause (1) shall, as soon as may be after it is made, be laid before each House, of Parliament; and it is not alleged that this has not been done. In fact, Mr. Chatterjee did not seriously press this point.

The next contention raised by Mr. Chatterjee is that the present detention of the two petitioners is invalid inasmuch as the orders of detention passed in both the cases directed that the petitioners should be detained in the Central Jail, Tiruchirapalli, whereas both of them have been detained throughout in the Central Jail, Cuddalore. Mr. Chatterjee's grievance is that it is not shown that a proper order had been passed changing the place of detention of the petitioners from Tiruchirapalli to Cuddalore.

The Plea has been met by the counter-affidavit filed on behalf of the Government of Madras on the ground that the original orders of detention indicating that the petitioners should be detained in the Central Jail, Tiruchirapalli, were modified by Government by a later Order fixing the venue of detention as the Central Jail, Cuddalore, for reasons of security. The counter-affidavit did not indicate the date on which this Order was passed, and that left an element of ambiguity. At the hearing of these petitions, however, the learned Counsel appearing for the Government of Madras has produced before us an abstract from the Madras Government Gazette giving all the details, about this order. It appears that this later Order was passed on 30th December, 1964, and it purported to modify all the orders stated in the preamble; amongst these orders are the orders of detention passed against both the petitioners. Therefore, it is clear that by virtue of the powers conferred on it by Rule 30 (4) the Government of Madras had changed the venue of the petitioners' detention; and so, there is no substance in the argument that their detention in the Central Jail, Cuddalore, is illegal.

Mr. Chatterjee's main contention against the validity of the orders of detention, however, is in regard to the alleged *mala fides* in the said orders. He argues that the impugned orders have been passed by the Government of Madras *mala fide* for the purpose of stifling the political activities of the petitioners which appeared to the Government of Madras to be inconvenient. These orders have been passed for that ulterior purpose and not for the purpose set out in the orders of detention. Besides, it is urged that the Chief Minister of Madras passed these orders without satisfying himself that it was necessary to issue them. He was influenced by what the Union Home Minister had already decided in regard to the petitioners. It is not as a result of the satisfaction of the Chief Minister himself that the petitioners had been detained orders of detention have been passed against the petitioners solely because the Union Home Minister was satisfied that they should be detained. That, in substance, is the grievance made before us by Mr. Chatterjee against the validity of the impugned orders of detention.

It appears that the Union Home Minister made certain statements in his broadcast to the Nation from the All India Radio on 1st January, 1965 and in reply to a debate on the Budget Demands of the Ministry of Home Affairs in the Lok Sabha.

on 27th April, 1965. This is what the Union Home Minister is reported to have said in his broadcast :—

“As you are aware, a number of leaders and active workers of the Left Communist Party of India have been detained during the last three days. We have had to take this step for compelling reasons for internal and external security of the country. It is painful to us to deprive any citizen of this free country of his liberty and it is only after the most careful thought that we have taken this action.”

This very disagreeable decision was taken after giving the most serious thought to all that was at stake.

We came to the conclusion that we would be taking a serious risk with the external and internal security of the country if we did not act immediately.”

This is what the Union Home Minister is reported to have said in the Lok Sabha :

“It is a matter of regret to me that I have had to make myself responsible for throwing into prison a fairly large number of citizens of this country.

I look into the case personally. I may say that it may be that some error may have occurred here and there ; that test has to be satisfied. We have to make sure that it is because of our clear appreciation of the activities which we may call Pro-Chinese, disloyal activities, subversive activities, one way or another, that we have to resort to this kind of action. If on any person, any detainee on his part, it can be said that there was a mistake made, that he actually is not Pro-Chinese and he is a loyal citizen of the country, I personally am prepared to look into each case and again satisfy myself that no wrong has been done or no injustice has been done.”

For the purpose of dealing with the present petitions, we are assuming that the petitioners can rely upon these two statements. The learned Additional Solicitor-General no doubt contended that these statements were not admissible and relevant and had not been duly proved ; besides, according to him, some of the statements produced were also inaccurate ; even so, he was prepared to argue on the basis that the said statements can be considered by us, and so, we have not thought it necessary to decide the question about the relevance or admissibility or proof of those statements in the present proceedings.

In appreciating the effect of these two statements, it is necessary to refer to the statements made on affidavit by the Chief Minister of Madras and the Chief Secretary to the Government of Madras respectively. This is what the Chief Minister of Madras has stated on oath :—

“Consequent upon the outbreak of hostilities between China and India and declaration of Emergency it was necessary for the Government of India and the various States to watch carefully the movements and activities of those persons, who either individually or as part of any group, were acting or likely to act in a manner prejudicial to the safety of India and the maintenance of public order. The Communist Party of India was rift into two factions and the faction known as the Left Communist Party of India, which came to be known as the Pro-Peking faction, had particularly to be watched. The question of detaining persons belonging to this faction and who were also active, was engaging the attention of the Governments and was also discussed at the Chief Ministers' Conference. Our sources of intelligence continued to maintain a watch over the movements and activities of these individuals. The Communist Party of India being an All India Organisation with a wide net work, the question of detention had necessarily to be considered on a National level, so that a co-ordinated and concerted action may be taken. It was in this context that the Central Government communicated with the State Government.

I submit that I ordered the petitioners in the above petitions to be detained, on 29th December 1964. The petitioners are also known to me and their detention was ordered on my personal satisfaction that it was necessary. My satisfaction was both on the general question as to the need for detaining persons like the petitioner and on the individual question namely whether the petitioner was one such, whose detention was necessary.”

The Chief Secretary's affidavit is on the same lines.

On these statements, the question which falls to be decided is : is it shown by the petitioners that the impugned orders of detention were passed for an ulterior purpose, or they have been passed by the Chief Minister of Madras without satisfying himself, merely because the Union Home Minister thought that the petitioners should be detained. It is not disputed that if the Union Home Minister wanted to make an order detaining the petitioners, he could have made the order himself. But the contention is that the orders, in fact, have been made by the Government

of Madras, and it is, therefore, necessary to consider whether the Chief Minister of Madras satisfied himself or not.

In dealing with these pleas, we cannot ignore the fact that the question about detaining the petitioners formed part of a larger question about the attitude which the Government of India and the State Governments should adopt in respect of the activities of the Party to which the petitioners belong. This Party is known as the Left Communist Party of India which came to be known as the Pro-Peking faction of the Communist Party. It is, therefore, not surprising that this larger issue should have been examined by the Union Home Minister along with the Chief Ministers of the States in India. The sources of intelligence available to the Government of India had given it the relevant information. Similarly, the sources of information available to the Governments of different States had supplied to their respective States the relevant information about the political activities of the Left Communist Party of India. Having considered these reports, the Union Home Minister and the Chief Ministers came to certain decisions in regard to the approach which should be adopted by them in respect of the Left Communist Party in view of the Emergency prevailing in the country. This general decision naturally had no direct relation to any particular individuals as such. The decision in regard to the individual members of the Left Communist Party had inevitably to be left to the State Governments or the Union Government according to their discretion. It is conceded that the Union Government has in fact issued orders of detention against as many as 140 members of the Left Communist Party of India, whereas different orders of detention have been passed by different State Governments against members of the Left Communist Party in their respective States. It is in the background of this position that the statements of the Union Home Minister as well as those of the Chief Minister of Madras have to be considered.

Thus considered, we do not see any justification for the assumption that the detention of the petitioners was ordered by the Chief Minister of Madras without considering the matter himself. Indeed, it is not denied that the Chief Minister knows both the petitioners and he has stated categorically that he examined the materials in relation to the activities of the petitioners and he was satisfied that it was necessary to detain them. We see no reason whatever why this clear and unambiguous statement made by the Chief Minister of Madras should not be treated as true. As the Chief Minister states in his affidavit, his satisfaction was both on the general question as to the need for detaining persons like the petitioners, and on the individual question of each one of them. In this connection, it is obvious that when the Union Home Minister spoke in the first person plural, he was speaking for the Union Government and the State Governments as well, and when he spoke in the first person singular, he was referring to cases with which he was concerned as the Union Home Minister, and that would take in cases of persons whose detention has been ordered by the Union Government. There is, therefore, no inconsistency or conflict between the statements of the Union Home Minister and the affidavit of the Chief Minister of Madras. That being so we are satisfied that there is no substance in the grievance made by Mr. Chatterjee that the impugned orders of detention passed against the petitioners were made either *mala fide* or without the proper satisfaction of the detaining authority.

In the result both the writ petitions fail and are dismissed.

V. K.

Petitions dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT :— J.C. SHAH, V. RAMASWAMI and V. BHARGAVA, JJ.

M. M. Parikh, Income-tax Officer, Special Investigation Circle 'B',

Ahmedabad

.. Appellant.*

v.

Navanagar Transport and Industries Ltd. and another

.. Respondents.

Narayan Investment Trust Private Ltd. etc. and others

.. Interveners.

Income-tax Act, 1922 (XI of 1922), section 23-A (after amendment in 1955) and section 34 (3) —Undistributed income—Profits of company—Declaration of dividend below statutory percentage—Order imposing additional super-tax under section 23-A—Whether an order of assessment—Bar of limitation under section 34 (3)—Whether applies to such an order.

At the annual general meeting held on 4th December, 1957, the assessee-company declared Rs. 8,767 as dividend payable to the shareholders for the year ending 31st March, 1957. The Income-tax Officer determined the taxable income of the assessee-company for the assessment year 1957-58, at Rs. 1,10,769. Since the dividend declared by the assessee-company was less than the statutory percentage of its total income as reduced by the taxes specified in clauses (a) and (b) of sub-section (1) of section 23-A of the Indian Income-tax Act, 1922, the Income-tax Officer issued a notice on 15th November, 1961, calling upon the assessee-company to show cause why an order under section 23-A should not be made for the assessment year 1957-58 and submitted the record to the Inspecting Assistant Commissioner seeking permission under sub-section (8). The assessee-company then applied to the High Court under Article 226 of the Constitution for a writ of *mandamus* restraining the Income-tax Officer from giving effect to the said notice. The High Court held that an order under section 23-A after its amendment by the Finance Act, 1955 was an "order of assessment" to which the period of limitation prescribed by section 34 (3) applied and since such an order cannot be made after the expiration of four years from the end of the assessment year 1957-58 the proceedings initiated against the assessee-company in respect of the assessment year 1957-58 after 31st March, 1962 was without jurisdiction. On appeal to the Supreme Court,

Held, that an order under section 23-A after amendment in 1955 is not an order of assessment. Section 23-A does not use the expression "assessment" in the body of clause (1); and to the title of the section after it was amended, *viz.*, "Power to assess companies to super-tax on undistributed income in certain cases" it is impossible to give any exalted meaning so as to convert what is an order directing payment of tax into an order of assessment within the meaning of section 34 (3).

Every order which contemplates computation of income for determination of the amount of tax payable is not an order of assessment within the meaning of the Act; nor does prescribing of procedure for determining and imposing tax liability make it an order of assessment.

The Income-tax Act contemplates making of diverse orders by the Income-tax Officers directing payments of sums of money by tax-payers which are of the nature of orders for payment of tax, but which are still not orders of assessment. The salient feature of these orders is that the liability to pay tax arises not from the charge created by the statute, but from the order of the Income-tax Officer.

There is a vital difference between the assessment of tax under section 23 and imposition of liability under section 23-A. Tax liability quantified by an order under section 23 is a charge statutorily imposed by sections 3 and 4 of the Act. It is true that the statutory liability is, till the last date of the year of account, ambulatory, but the charge is still a statutory charge on income. The function of the Income-tax Officer is to compute the taxable income and to crystallize the charge on the taxable income. Under section 23-A there is no statutory charge in respect of additional super-tax and the liability is imposed by the order of the Income-tax Officer. Source of the liability to pay additional super-tax is not in sections 3 and 4 of the Act; it lies in and arises out of the order of the Income-tax Officer.

The provisions of section 23-A have to be construed as they stood before the Act of 1961 was enacted, and the mere fact that the Legislature has chosen to specify a period of limitation for making an order imposing liability under section 104 of the Act of 1961 upon a company which has failed to distribute the statutory percentage of its distributable income will not justify an inference that such a period of limitation was implicit in the previous Act.

Appeal from the Judgment and Order dated the 21st February, 1964, of the Gujarat High Court in Special Civil Application No. 802 of 1962.

S.V. Gupte, Solicitor-General of India (*N. D. Karkhanis* and *R.N. Sachthey*, Advocates, with him), for Appellant.

S.T. Desai, Senior Advocate (*K. R. Chaudhuri*, Advocate, with him), for Respondents.

R. Venkataraman, and *R. Gopalakrishnan*, Advocates, for Intervener No. 1.

S. P. Mehta, *D. Pal*, and *D.N. Gupta*, Advocates, for Intervener No. 2.

D. Pal and *D.N. Gupta*, Advocates, for Intervener No. 3.

R. Gopalakrishnan, Advocate (*S. Swaminathan*, Advocate, with him), for Intervener No. 4.

The Judgment of the Court was delivered by

Shah, J.—*M/s. Navanagar Transport & Industries Ltd.*—hereinafter called “the assessee”—is a company in which “the public are not substantially interested” within the meaning of section 23-A of the Indian Income-tax Act, 1922. At the annual general meeting held on 4th December, 1957, the company declared Rs. 8,767 as dividend payable to the shareholders for the year ending 31st March, 1957. The Income-tax Officer, Special Investigation Circle, Ahmedabad, determined the taxable income of the assessee for the assessment year 1957-58 at Rs. 1,10,769. Since the dividend declared by the company was less than the statutory percentage of the total income of the company, as reduced by the taxes specified in clauses (a) and (b) of sub-section (1) of section 23-A, the Income-tax Officer issued a notice on 15th November, 1961 calling upon the assessee to show cause why an order under section 23-A should not be made for the assessment year 1957-58 and submitted the record to the Inspecting Assistant Commissioner seeking permission under sub-section (8). The assessee then applied to the High Court of Gujarat under Article 226 of the Constitution for a writ of *mandamus* restraining the Income-tax Officer from giving effect to the notice under section 23-A against the assessee.

The High Court held that an order under section 23-A of the Income-tax Act, 1922, after its amendment by the Finance Act, 1955, is an “order of assessment” to which the period of limitation prescribed by section 34 (3) applies and since such an order cannot be made after the expiration of four years from the end of the assessment year 1957-58 the proceedings initiated against the assessee in respect of the assessment year 1957-58 after 31st March, 1962 was without jurisdiction. The Income-tax Officer has appealed to this Court with certificate granted by the High Court.

Section 23-A has undergone changes from time to time. Before it was amended by the Finance Act, 1955, section 23-A enacted that where the Income-tax Officer is satisfied, that the dividends distributed by the company are less than sixty per cent. of the assessable income of the company as reduced by the income-tax and super-tax payable by the company, he shall make an order (except in certain circumstances specified) that the undistributed portion of the assessable income of the company computed for income-tax purposes as reduced by the income-tax and super-tax in respect thereof be deemed to have been distributed as dividends among the shareholders and thereupon the proportionate share of each shareholder shall be included in the total income of each shareholder for the purpose of assessing his total income. Before an order under section 23-A, as it then stood, became effective, two steps had to be taken—(i) an order had to be made that the undistributed portion of the assessable income of the company shall be deemed to have been

distributed as dividends among the shareholders ; and (ii) the deemed income of each shareholder had to be included in the total income of such shareholder for the purpose of assessing his total income. An order declaring that the undistributed portion of the income shall be deemed to have been distributed was not an order of assessment : the order of assessment was made only when the Income-tax Officer took action against each shareholder for bringing the deemed income of each shareholder to tax in his individual assessment. The Legislature did not provide any period of limitation for making an order declaring that the undistributed portion of the income shall be deemed to be distributed as dividends. But since the order had to be followed up in the assessments of the shareholders individually, the order would, if made, be ineffective, if it was not made within the period prescribed by section 34 (3) : see *Commissioner of Income-tax, Bombay City I v. Robert J. Sas and others*¹. The procedure for bringing to tax undistributed income of companies which distributed less than the statutory percentage of its total income was clumsy and dilatory. Before tax could be recovered, enquiry had to be made into the matters referred to in section 23-A (1) and also whether the company was one in which the public were not substantially interested, and after the order was made, each individual shareholder had to be separately assessed in respect of the deemed income.

The Legislature by the Finance Act, 1955, altered the scheme for imposition and collection of tax. Section 23-A as amended by the Finance Act, 1955, read as follows :

“(1) Subject to the provisions of sub-sections (3) and (4), where the Income-tax Officer is satisfied that in respect of any previous year the profits and gains distributed as dividends by any company within the twelve months immediately following the expiry of that previous year are less than sixty per cent. of the total income of the company of that previous year as reduced by—

(a) the amount of income-tax and super-tax payable by the company in respect of its total income, but excluding the amount of any super-tax payable under this section ;

(b) the amount of any other tax levied under any law for the time being in force on the company by the Government or by a local authority in excess of the amount, if any, which has been allowed in computing the total income ; and

(c) in the case of a banking company, the amount actually transferred to a reserve fund under section 17 of the Banking Companies Act, 1949 (X of 1949) ;

the Income-tax Officer shall, unless he is satisfied that, having regard to losses incurred by the company in earlier years or to the smallness of the profits made in the previous year, the payment of a dividend or a larger dividend than that declared would be unreasonable, make an order in writing that the company shall, apart from the sum determined as payable by it on the basis of the assessment under section 23, be liable to pay super-tax at the rate of four annas in the rupee on the undistributed balance of the total income of the previous year, that is to say, on the total income reduced by the amounts, if any, referred to in clause (a), clause (b) or clause (c) and the dividends actually distributed, if any :

Provided that—

(a) in the case of a company whose business consists wholly or mainly in the dealing in or holding of investments ; and

(b) in the case of any other company where the reserves (including the amounts capitalised from the earlier reserves) representing accumulations of past profits which have not been the subject of an order under this sub-section, exceed either the aggregate of—

(i) the paid-up capital of the company exclusive of the capital, if any, created out of its profits and gains which have not been the subject of an order under this sub-section, and

(ii) any loan capital which is the property of the shareholders, or the actual cost of the fixed assets of the company, whichever of these is greater,

this section shall apply as if for the words ‘sixty per cent. of the total income’, wherever they occur, the words, ‘the whole of the total income’ had been substituted.

(2) No order under sub-section (1) shall be made—

(i) in the case of a company referred to in clause (a) of the proviso to that sub-section, which has distributed not less than ninety per cent. of its total income as reduced by the amounts, if any, referred to in clause (a), clause (b) or clause (c) of that sub-section, or

(ii) in the case of any other company which has distributed not less than fifty-five per cent. of its total income as reduced by the amounts, if any, aforesaid, or

(iii) in any case where according to the return made by a company under section 22, it has distributed not less than sixty per cent. of its total income as reduced by the amounts, if any, aforesaid, but in the assessment made by the Income-tax Officer under section 23 a higher total income is arrived at, and the difference in the total income does not arise out of the application of the proviso to section 13 or sub-section (4) of section 23 or the omission by the company to disclose its total income fully and truly,

unless the company, on receipt of a notice from the Income-tax Officer that he proposes to make such an order, fails to make within three months of the receipt of such notice a further distribution of its profits and gains so that the total distribution made is not less than sixty per cent. of the total income of the company of the relevant previous year as reduced by the amounts, if any, aforesaid.

(3) Where on an application presented to him in this behalf by a company within the period of twelve months referred to in sub-section (1) or within the period of three months referred to in sub-section (2), the Commissioner of Income-tax is satisfied, having regard to the current requirements of the company's business or such other requirements as may be necessary or advisable for the maintenance and development of that business, the declaration or payment of a dividend or a larger dividend than that proposed to be declared or paid would be unreasonable, he may reduce the amount of the minimum distribution required of that company under sub-section (1) to such figure as he may consider fit and further determine the period within which such distribution should be made.

* * * *

The principal change made by the amendment was that in the conditions prescribed by the section, the company and not the shareholders were made liable to pay tax, and for that purpose the procedure was rationalized. The original scheme which contemplated two orders—one against the company and the other against each individual shareholder was replaced by the imposition of tax liability upon the company, on the Income-tax Officer being satisfied about the existence of preliminary conditions which attracted liability to additional super-tax.

By the Finance Act XXVI of 1957 the section was further modified. Sub-sections (1) and (2), in so far as they are material, were substituted by the following sub-sections :

“(1) Where the Income-tax Officer is satisfied that in respect of any previous year the profits and gains distributed as dividends by any company within the twelve months immediately following the expiry of that previous year are less than the statutory percentage of the total income of the company of that previous year as reduced by—

(a) the amount of income-tax and super-tax payable by the company in respect of its total income, but excluding the amount of any super-tax payable under this section ;

(b) the amount of any other tax levied under any law for the time being in force on the company by the Government or by a local authority in excess of the amount, if any, which has been allowed in computing the total income ; and

(c) in the case of a banking company, the amount actually transferred to a reserve fund under section 17 of the Banking Companies Act, 1949 :

the Income-tax Officer, shall, unless he is satisfied that having regard to losses incurred by the company in earlier years or to the smallness of the profits made in the previous year, the payment of a dividend or a larger dividend than that declared would be unreasonable, make an order in writing that the company shall, apart from the sum determined as payable by it on the basis of the assessment under section 23, be liable to pay super-tax at the rate of fifty per cent. in the case of a company whose business consists wholly or mainly in the dealing in or holding of investments, and at the rate of thirty-seven per cent. in the case of any other company, on the undistributed balance of the total income of the previous year, that is to say, on the total income reduced by the amounts, if any, referred to in clause (a), clause (b) or clause (c) and the dividends actually distributed, if any.

(2) No order under sub-section (1) shall be made,—

(i) in the case of a company whose business consists wholly or mainly in the dealing in or holding of investments which has distributed not less than ninety per cent. of its total income as reduced by the amounts, if any, referred to in clause (a), clause (b) or clause (c) of sub-section (1) ; or

(ii) in the case of any other company whose distribution falls short of the statutory percentage by not more than five per cent. of its total income as reduced by the amounts, if any, aforesaid ; or

(iii) in any case where according to the return made by a company under section 22 it has distributed not less than the statutory percentage of its total but in the assessment made by the Income-tax Officer under section 23 a higher total income does not arise out of the application

of the proviso to section 13 or sub-section (4) of section 23 or the omission by the company to disclose its income fully and truly;

Unless the company, on receipt of a notice from the Income-tax Officer, that he proposes to make such an order, fails to make within three months of the receipt of such notice a further distribution of its profits and gains, so that the total distribution made is not less than the statutory percentage of the total income of the company as reduced by the amounts, if any, aforesaid."

Sub-sections (3) to (7) of section 23-A as introduced by the Finance Act, 1955, were omitted. By this amendment, the scheme for imposing liability for payment of additional super-tax was not altered.

It was urged before the High Court and the argument appealed to the High Court, that an order under section 23-A as amended by the Finance Act, 1955, and as further modified by the Finance Act, 1957, by the Income-tax Officer directing payment of additional super-tax was an order of assessment which could only be made before the expiry of the period of limitation prescribed by section 34 (3) of the Income-tax Act, 1922. In support of this view, it was said that the expression "assessment" used in the Indian Income-tax Act, 1922, has different meanings in the context in which it occurs: sometimes it is used as meaning computations of income, sometimes as determination of the amount of tax payable, and sometimes the procedure for imposing liability upon the taxpayer. Reliance in this behalf was placed upon the judgment of the Privy Council in *Commissioner of Income-tax, Bombay Presidency & Aden v. Khemchand Ramdas*¹. But section 23-A does not use the expression "assessment" in the body of clause (1) : and to the title of the section after it was amended, viz., "Power to assess companies to super-tax on undistributed income in certain cases", it is impossible to give any exalted meaning so as to convert what is an order directing payment of tax into an order of assessment within the meaning of section 34 (3) of the Indian Income-tax Act, 1922. Every order which contemplates computation of income for determination of the amount of tax payable is not an order of assessment within the meaning of the Act : nor does prescribing of procedure for determining and imposing tax liability make it an order of assessment. The Income-tax Act contemplates making of diverse orders by Income-tax Officers directing payments of sums of money by taxpayers which are of the nature of orders for payment of tax, but which are still not orders of assessment. For instance, under section 18-A (1) the Income-tax Officer is entitled to direct advance payment of tax. An order may also be made under section 35 (9) where the Income-tax Officer is satisfied that the income-tax payable by a company on its profits and gains out of which the company has declared a dividend, has not been paid within three years after the financial year in which the dividend was declared, he may proceed to recompute the amount by reducing it in the same proportion as the amount of income-tax remaining unpaid by the company bears to the amounts of income-tax payable by it on such profits and gains. Similarly, under sub-section (10) of section 35, before it was deleted by the Finance Act, 1959, where a rebate of income-tax was allowed to a company on a part of its total income and subsequently the amount on which the rebate of income-tax was allowed was availed of by the company, for declaring dividends in any year, the Income-tax Officer had to recompute the tax by reducing the rebate originally allowed. Again by section 35 (11), as added by the Finance Act of 1958, development rebate in respect of a ship, machinery or plant under section 10 (2) (vi-b) could be deemed to have been wrongly allowed if the ship, machinery or plant was sold or otherwise transferred, or the amount credited to the reserve account under that clause was diverted for another purpose within ten years, and the Income-tax Officer had to recompute the income, and levy tax on the footing of such recomputed income. In each of these cases there is computation of income, determination of tax payable and procedure is prescribed for imposing liability upon the taxpayer. But still these are not orders of assessment within the meaning of section 23. The salient feature of these and other orders is that the liability to pay tax arises not from the charge created by statute, but from the order of the Income-tax Officer.

1. (1938) 2 M.L.J. 115; L.R. 65 I.A. 236; A.I.R. 1938 P.C. 175.

The argument that section 23-A is a self-contained section imposing liability to pay additional super-tax does not convert that section into one for assessment of tax. There is undoubtedly a hearing before liability is imposed for payment of additional super-tax; there is declaration of liability and the liability is determined in the manner prescribed by the section. That there is, as was argued before this Court, "a considerable parallel between sections 23 and 23-A" will not justify the assumption that what is done by an order under section 23-A as amended is assessment of tax liability. There is however a vital difference between the assessment of tax under section 23 and imposition of liability under section 23-A. Tax liability quantified by an order under section 23 is a charge statutorily imposed by sections 3 and 4 of the Act. It is true that the statutory liability is, till the last day of the year of account, ambulatory, but the charge is still a statutory charge on income. The function of the Income-tax Officer is to compute the taxable income and to crystallize the charge on the taxable income. Under section 23-A there is no statutory charge in respect of additional super-tax and the liability is imposed by the order of the Income-tax Officer. Source of the liability to pay additional super-tax is not in sections 3 and 4 of the Act: it lies in and arises out of the order of the Income-tax Officer. Before imposing liability for additional super-tax, the Income-tax Officer has to determine whether the company is one to which the provisions of section 23-A apply; he has also to determine whether the company has distributed within twelve months immediately following the expiry of the previous year the statutory percentage of the total income of the company as reduced by the taxes and levies prescribed therein; he has also to determine whether, having regard to the loss incurred by the company in the earlier years or to the smallness of the profits made in the previous year, the payment of a dividend or a larger dividend than that declared would be unreasonable. It is after making these enquiries that the Income-tax Officer may make the order directing payment of additional super-tax at the rates prescribed. The process to be followed is not the process of assessment, but of determining whether the liability should be charged and imposed. For that purpose the company is given a right to explain the reasons for failure to distribute the statutory percentage of profits as dividends. In certain special circumstances contemplated by sub-section (2) of section 23-A, the order imposing tax liability cannot be made unless the company after receiving a notice from the Income-tax Officer that he proposes to make such an order fails to make within three months of the order further distribution of its income so that the total distribution made is not less than the statutory percentage of the total income of the company of the relevant previous year as reduced by the amounts, if any, aforesaid. Provision was also made in sub-section (3) inserted by the Finance Act of 1955 authorising the Commissioner of Income-tax to reduce the amount of minimum distribution required of a company, if having regard to the current requirements of the company's business or such other requirements as may be necessary, or advisable for the maintenance or development of the business, the declaration or payment of a dividend or a larger dividend than that proposed to be declared was unreasonable.

It was urged that under the Indian Income-tax Act XLIII of 1961 the Parliament has prescribed by section 106 for making an order under section 104 (of which the scheme is similar to the scheme of section 23-A as amended) a period of limitation. Section 106 of the Income-tax Act, 1961, provides that no order under section 104 shall be made after the expiry of four years from the end of the assessment year relevant to the previous year referred to in sub-section (1) of that section, or after the expiry of one year from the end of the financial year in which the assessment or re-assessment of the profits and gains of the previous year aforesaid is made, whichever is later. But the provisions of section 23-A have to be construed as they stood before the Act of 1961 was enacted, and the mere fact that the Legislature has chosen to specify a period of limitation for making an order imposing liability under section 104 of the Act of 1961 upon a company which has failed to distribute the statutory percentage of its distributable income will not justify an inference that such a period of limitation was implicit in the previous Act.

Section 23-A, before it was amended by the Finance Act, 1955, was undoubtedly procedural : *Commissioner of Income-tax, Bombay City I v. Afco (Private) Ltd.*¹. Section 23-A (1), after it was amended by the Finance Act, 1955, provides within itself machinery for imposition of liability to pay additional super-tax, but it has not on that account been made a charging section. A charge to tax arises under sections 3, 4 and 55 of the Act for payment of income-tax and super-tax and not under section 23-A.

Some additional indication which supports the view which we have expressed is furnished by sections 30 and 31 of the Indian Income-tax Act. Section 30 provides for appeals from certain specified orders of the Income-tax Officer to the Appellate Assistant Commissioner. Under section 30 an assessee denying his liability to be assessed under the Act may appeal against the order of assessment. If the assessee is a company it may also appeal against an order made under section 23-A (1) under section 30. If an order under section 23-A were to be regarded as an order of assessment, it was plainly unnecessary to retain, after the amendment by the Finance Act, 1955, the right to appeal against the order made under sub-section (1) of section 23-A by an independent clause. It is true that by section 20 (4) of the Finance Act, 1955 it was expressly enacted that the provisions of section 23-A of the Income-tax Act as in force immediately before 1st April, 1955, shall continue to apply to a company in respect of which profits and gains of the previous year relating to the assessment year prior to the assessment year ending 31st March, 1956, and also to its shareholders referred to in sub-section (1) of section 23-A as then in force in respect of their appropriate previous years, and this necessitated that the right to appeal against the order under section 23-A before it was amended be preserved. But there is nothing in section 30 which indicates that the reference to the right of appeal was restricted to orders under section 23-A, before the Act was amended by the Finance Act, 1955, and that it did not refer to an order made under section 23-A (1) after that clause was amended. The specific clause relating to the right of appeal reserved against the order under sub-section (1) of section 23-A is general, and confers a right of appeal against the order passed under sub-section (1) of section 23-A before it was amended by the Finance Act, 1955, and also under section 23-A after it was amended. There is no such reservation of the nature suggested by Counsel for the assessee, and we see no reason to hold that the Legislature intended to make such a reservation and did not expressly so provide.

Under sub-section (2) of section 30 different periods of limitation for filing appeals against various orders under the Income-tax Act are prescribed. Against an order of assessment, an appeal lies within 30 days from the date of receipt of notice of demand objected to, and against an order under section 23-A an appeal lies within 30 days from the intimation of an order under that section. The Act does not call the order under section 23-A (1) for payment of additional super-tax a notice of demand. If the argument that an order under section 23-A, after it was amended, is an order of assessment evidently the period of limitation covered by the first clause, namely, thirty days from the receipt of notice of demand will apply. It could not have been intended that the right of appeal could be exercised either within thirty days from the date on which an order under section 23-A was intimated or within thirty days from the date of receipt of notice of demand. Similarly, section 31 which deals with the right of appeal from an order of assessment to the Appellate Assistant Commissioner, provides by sub-section (3) that in disposing of an appeal the Appellate Assistant Commissioner may, in the case of an order of assessment—(a) confirm, reduce, enhance or annul the assessment or (b) set aside the assessment and direct the Income-tax Officer to make a fresh assessment after making such further inquiry as the Income-tax Officer thinks fit, or the Appellate Assistant Commissioner may direct, etc., and in the case of an order under sub-section (1) of section 23-A under clause (d) confirm, cancel or vary such order. If an order under sub-section (1) of section 23-A was an order of assessment even after the Act was amended it was unnecessary to retain clause (d) in that form.

1. (1963) 1 I.T.J. 175 : (1963) 1 S.C.J. 271.

The right to prefer an appeal could obviously be exercised both against an order under section 23-A before it was amended and after it was amended. Since the Legislature has not chosen to make suitable amendments to restrict the right of appeal only to those cases where the right is exercised against an order declaring that the undistributed portion of the income shall be deemed to be distributed, it may reasonably be inferred that the right is exercisable in respect of the orders made prior to the amendment made by the Finance Act, 1955, and also orders made thereafter.

It was pointed out that under section 45 of the Act reference to sub-section (3) of section 13-A could only be to the section as it stood before the amendment by the Finance Act, 1955. Insofar as it is material, section 45 provides :

"Any amount specified as payable in a notice of demand under sub-section (3) of section 23-A * * * shall be paid* * * within the time, at the place and to the person mentioned in the notice or order, * * *"

Under sub-section (3) of section 23-A before it was amended by the Finance Act of 1955, tax payable on the proportionate share of any member of a company in the undistributed profits was liable to be recovered from the company if it could not be recovered from the shareholder. By the Finance Act, 1955, this clause was deleted and another clause which had nothing to do with recovery of tax was substituted as sub-section (3). By the Finance Act, 1957, that new sub-section (3) has been deleted. Section 45 deals with recovery of tax and in the context in which it occurs, reference in section 45 to sub-section (3) of section 23-A can only mean reference to that sub-section as it stood prior to the Finance Act of 1955. But that cannot be a ground for inferring that by section 23-A which is referred to in sections 30 and 31 only intended to refer to the section as it stood before the Finance Act, 1955.

The appeal is allowed and the petition filed by the assessee is dismissed with costs in this Court and the High Court.

T.K.K.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:— J. C. SHAH AND V. RAMASWAMI, JJ.

Chandulal Harjiwandas

*Appellant**

v.

Commissioner of Income-tax, Gujarat

Respondent.

Income-tax Act (XI of 1922), section 15 (1)—Exemption—Life insurance—"Children's Deferred Endowment Assurance"—Policy on minor's life taken by father—Premium paid out of minor's taxable income—Rebate, whether admissible in minor's assessment.

On 23rd June, 1959, a policy called "Children's Deferred Endowment Assurance" for a sum of Rs. 50,000 was issued by the Life Insurance Corporation of India. The proposer was the assessee's father and the life assured was that of the assessee. The premium payable in respect of the policy was Rs. 1,925 per annum. That amount was paid as premium out of the taxable income of the assessee. According to the contract of insurance the Corporation was liable to pay the sum assured (a) on the stipulated date of maturity, if the life assured was alive on that date i.e., 11th March, 1982, or (b) if the life assured were to die before the said date, provided that the death occurred on or after the deferred date, i.e., 11th March, 1965. Under the terms of the policy the life assured could adopt the policy at any time after attaining majority and before the deferred date and on such adoption the policy was deemed to be a contract between the Corporation and the life assured as the absolute owner of the policy from the date of such adoption. All moneys payable in terms of the policy were, if the policy had been adopted, payable to the life assured, or his assigns or nominees and if the policy had not been adopted the moneys were payable to the proposer or his proving executors or administrators or other legal representatives. On adoption the life assured was entitled

to receive the cash option in entire cancellation of the policy or the sum assured, if alive on the date of maturity. If the life assured continued to be alive after the deferred date but failed to adopt the policy, then the policy would stand cancelled and it was the proposer who would be entitled to the cash option and not the life assured. If the life assured were to die before the deferred date then also the policy would stand cancelled and it was the proposer and not the heirs of the life assured who would be entitled to the premiums actually paid. In the course of the assessment for the assessment year 1960-61 the assessee claimed rebate on the insurance premium of Rs. 1,925 under the provisions of section 15 (1) of the Indian Income-tax Act, 1922. The Income-tax Officer rejected the claim on the ground that under the said policy the life of the minor-assessee had not been assured. This decision was confirmed by the appellate authorities. The High Court answered the reference against the assessee and held that the contract would become the assessee's contract only by his adopting it on attaining majority. On appeal to Supreme Court,

Held, that the contract was in substance a contract of insurance on the life of the assessee and therefore rebate under section 15 (1) of the Act was admissible on the premium.

The insurance on the life of the assessee was the main intention of the contract and the other clauses relating to the payment of moneys to the proposer in certain events, were merely ancillary or subordinate to that main purpose.

All that section 15 (1) requires is that in order to get exemption from payment of tax in respect of any sum two conditions must be satisfied, viz, (1) such sum must have been paid by the assessee himself, and (2) that such payment must have been made to effect an insurance on the life of the assessee himself.

The requirements of section 15 (1) were satisfied in this case. The subject-matter of the contract was the insurance on the life of the assessee and the payment of the premium was made by the assessee out of his taxable income.

Appeal from the Judgment and Order dated the 9th September, 1963 of the Gujarat High Court in Income-tax Reference No. 20 of 1962.

I. N. Shroff, Advocate, for Appellant.

S. T. Desai, Senior Advocate, (*Gopal Singh* and *R. N. Sachthey*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Ramaswami, J.—This appeal is brought, by certificate, from the judgment of the High Court of Gujarat dated 9th September, 1963, in Income-tax Reference No. 20 of 1962.

On 23rd June, 1959, a policy called "Children's Deferred Endowment Assurance" for a sum of Rs. 50,000 was issued by the Life Insurance Corporation of India. The proposer was Harjiwandas Kotecha, the father of the appellant (herein-after called the "assessee" and the life assured was that of the assessee. The premium payable in respect of the policy was Rs. 1,935 per annum. That amount was paid as premium out of the taxable income of the assessee. In the course of the assessment for the assessment year 1960-61, the assessee claimed rebate on the insurance premium of Rs. 1,925 under the provisions of section 15 (1) of the Income-tax Act, 1922 (herein-after called the "Act"). The Income-tax Officer rejected the claim on the ground that under the said policy the life of the minor assessee had not been assured. The Appellate Assistant Commissioner agreed with the Income-tax Officer and held that the claim of the assessee was rightly rejected. The assessee took the matter in further appeal before the Appellate Tribunal but the appeal was dismissed. At the instance of the assessee the Appellate Tribunal stated a case to the High Court on the following question of law.

"Whether rebate under section 15 (1) of the Income-tax Act, 1922 is admissible on the premium payable as per Annexure 'A' during the minority of the assessee?"

The High Court of Gujarat answered the reference in favour of the respondent and against the assessee. The High Court held that the contract of insurance with the Life Insurance Corporation was entered into by the father of the assessee and under the terms thereof the contract was to become the assessee's contract only by his adopting it on attaining majority. The High Court further held that on the true

interpretation of the terms of the contract, even if the minor were to be alive on the deferred date it was the assessee's father who was entitled to receive the cash option unless the assessee adopted the contract as his own. The High Court accordingly observed that the real contracting parties were the father of the assessee and the Life Insurance Corporation and it was only under certain contingency on the happening of which the contract was to become the contract of the assessee.

Section 15 (1) of the Act provides as follows :

"Exemption in the case of life Insurances.—(1) The tax shall not be payable in respect of any sums paid by an assessee to effect an insurance on the life of the assessee or on the life of a wife or husband of the assessee or in respect of a contract for a deferred annuity on the life of the assessee or on the life of a wife or husband of the assessee or as a contribution to any Provident Fund to which the Provident Funds Act, 1925 (XIX of 1925), applies."

The policy, a copy of which is annexed to the statement of the case as Annexure 'A' mentions the following details :

Cash Option Rs. 11,693-50	Deferred Date 11-3-65	Date of Maturity. 11-3-82
Event on the happening of which sum assured payable.		On the stipulated date of Maturity if the Life Assured is then alive or at his prior death if it shall occur on or after the Deferred Date."

Clause 5 of the policy provides :

"All money payable in terms of these provisions shall, if the Policy has been adopted by the Life Assured, be payable to the Life Assured, or his Assigns or Nominees under Section 39 of the Insurance Act or Proving Executors or Administrators or other legal Representatives..... Provided always that in the event of the Life Assured not having adopted the Policy, the moneys payable in terms of these provisions shall become payable to the proposer or his proving Executors or Administrators or other Legal Representatives....."

Certain other provisions contained in the policy which are material are to the following effect :

"The Life Assured shall at any time after attaining majority and before the Deferred Date by a writing signed by him adopt this Policy, agreeing to be bound by all its provisions. On such adoption by the Life Assured, this Policy shall be deemed to be a contract between the Corporation and the Life Assured as the absolute owner of the Policy as from the date of such adoption and the proposer or his Estate shall not have any right or interest therein....."

Provided that if all the premiums due prior to the Deferred Date have been paid, the person entitled to the Policy moneys shall have the option to apply for and receive as on the Deferred Date the Cash Option mentioned in the Schedule in entire cancellation of this Policy.

This Policy shall stand cancelled in case the Life Assured shall die before the Deferred Date and in such event a sum of money equal to all the premiums paid without any deduction whatsoever shall become payable to the person entitled to the Policy moneys.

This Policy shall stand cancelled also in the event of the Life Assured declining to adopt or failing or neglecting to adopt the Policy before the Deferred Date, and in such event a sum of money equal to the Cash Option will become payable to the person entitled to the Policy moneys."

According to the contract of insurance the Life Insurance Corporation was liable to pay the sum assured (a) on the stipulated date of maturity, if the life assured was alive on that date, i.e., 11th March, 1982, or (b) if the life assured were to die before the said date, provided that the death occurred on or after the deferred date i.e., 11th March, 1965. Under the terms of the policy these are the two events upon the happening of either of which the Corporation was to pay the sum assured viz., Rs. 50,000. A special clause of the policy provides that at any time after attaining majority and before the deferred date the life assured may adopt the policy and on such adoption the policy is deemed to be a contract between the Corporation and the life assured as the absolute owner of the policy from the date of such adoption. In our opinion, the requirements of section 15 (1) of the Act are satisfied in this case because all that section 15 (1) requires is that in order to get exemption from payment of tax in respect of any sum two conditions must be satisfied, viz., (1) such sum must have been paid by the assessee himself, and (2) that such payment must have been made to effect an insurance on the life of the assessee himself. In the

present case, the subject-matter of the contract is the insurance on the life of the assessee and it is not disputed that the payment of the premium was made by the assessee out of his taxable income. On behalf of the respondent Mr. Desai contended that the assessee was not entitled to the rebate under section 15 (1) of the Act on the premium paid. It was pointed out that the contract of insurance provided that the assessee was not entitled to the benefit of the policy till he adopted the contract on the date of his attaining majority. The argument was stressed that the contract was made between the Life Insurance Corporation and the father of the assessee and under the terms thereof it could become the assessee's contract only on his adopting it on his attaining majority. It was pointed out that if the assessee continued to be alive after the Deferred Date but failed to adopt the policy, it was the proposer who would be entitled to the cash option and not the assessee. If the assessee were to die before the Deferred Date the policy would stand cancelled and in that event it was the proposer and not the heirs of the assessee who would get the sums equal to the premiums paid. We are, however, of the opinion that the contract of insurance between the assessee's father and the Life Insurance Corporation must be read as a whole and in spite of the clauses referred to by Mr. Desai we consider that the contract is in substance a contract of life insurance with regard to the life of the assessee. The important point to notice is that if the assessee adopts the policy upon attaining majority the Corporation becomes liable to pay the sum assured, viz., Rs. 50,000 to the assessee on the stipulated date of maturity, i.e. 11th March, 1982 if the assessee was alive. The Life Insurance Corporation will also be liable to pay the amount assured if the assessee were to die before the stipulated date of maturity but on or after the Deferred Date i.e., 11th March, 1965. In our opinion, the insurance on the life of the assessee was the main intention of the contract and the other clauses upon which Mr. S. T. Desai relied are merely ancillary or subordinate to that main purpose. Life insurance in a broader sense comprises any contract in which one party agrees to pay a given sum upon the happening of a particular event contingent upon the duration of human life, in consideration of the immediate payment of a smaller sum or certain equivalent periodical payments by another party (Halsbury's Laws of England, 3rd Edn., Vol. 22, p. 273). It was held by the Court of Appeal in *Gould v. Curtis*¹, that for the purpose of the statutory provisions relating to relief in respect of life insurance premiums for purposes of income-tax, a contract by which a sum is payable on the death of the assured within a specified period and a larger sum if he is alive at the end of the period must be held to be an insurance on life. There is no definition of "life insurance" in the Act but there is such a definition given in section 2 (11) of the Insurance Act, 1938 (IV of 1938) which reads :

" 'Life insurance business' means the business of effecting contracts of insurance upon human life, including any contract whereby the payment of money is assured on death (except death by accident only) or the happening of any contingency dependent on human life, and any contract which is subject to payment of premiums for a term dependent on human life...."

It should be remembered in this connection that the object of enacting section 15(1) of the Act is the encouragement of thrift and the section should hence be interpreted in such a manner as not to nullify that object. Having examined all the clauses of the contract of insurance in this case, we are satisfied that it is in substance a contract of insurance on the life of the assessee and therefore rebate under section 15 (1) of the Act is admissible on the premium payable as per Annexure 'A' of the Statement of the Case during the minority of the assessee.

For these reasons we hold that this appeal must be allowed with costs of this Court and of the High Court.

T.K.K.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH, V. RAMASWAMI AND V. BHARGAVA, JJ.

Ram Kumar Agarwal and Brothers

.. Appellant*

v.

Commissioner of Income-tax, Calcutta

.. Respondent.

Income-tax Act (XI of 1922), section 4 (3) (vii)—Adventure in the nature of trade—Assessee, a firm of sharebrokers—Joint negotiations to purchase controlling interest in a company—Subsequent agreement with rival purchaser to secure and transfer controlling interest—Amount received from rival purchaser on completion of transaction—Whether revenue receipt or non-recurring casual receipt.

Some time early in 1946 *M/s. H. Bros.* who were the managing agents of Swadeshi Cotton Mills, Ltd. desired to dispose of their shareholding in the mills and to part with the managing agency. The assessee, a firm of sharebrokers, jointly with *D* (a partner of the Chartered Accountants of the mills) and *R.* (a partner of the Solicitors of the mills) started negotiations with *M/s. H. Bros.* to purchase the controlling interest in the mills. In April, 1946, another firm, *M/s. M.J.* which was also negotiating to secure the controlling interest in the mills wrote a letter to *D* to the effect that "in the event of your securing the same (controlling interest in the mills) for us and upon your giving up all claims to purchase the same and assigning to us and our associates any interest that you may have acquired therein, we hereby agree to pay you and your colleagues a capital sum of Rs. 6,00,000....." *M/s. M.J.* purchased the shareholding of *M/s. H. Bros.* for Rs. 4,03,00,000 and duly paid Rs. 6,00,000 out of which the assessee received its share of Rs. 2,00,000. The assessee paid Rs. 25,000 out of this amount to *G* for "services rendered in the deal" and credited the balance of Rs. 1,75,000 as "brokerage" in its profit and loss account and submitted a return of income for the assessment year 1947-48, showing that receipt as income from "brokerage in the course of business." Later, the assessee submitted a revised return excluding the amount of Rs. 1,75,000. The Income-tax Officer rejected the claim of the assessee that the amount of Rs. 1,75,000 was a non-recurring casual receipt exempt from tax under section 4 (3) (vii) of the Indian Income-tax Act, 1922 or that it was a capital and not revenue receipt. The order was confirmed by the Appellate Assistant Commissioner. The Tribunal held that the sum of Rs. 2,00,000 accrued to the assessee as a result of a venture in the nature of trade and it was a revenue receipt. The High Court, on reference, answered the question against the assessee. On appeal to the Supreme Court,

Held, that the conclusion that the assessee and its two associates received Rs. 6,00,000 not in consideration of refraining from competing in the purchase of the controlling interest, but as remuneration for services rendered is based on evidence before the Tribunal. The receipt must therefore be regarded as a revenue receipt earned in the course of the business of the assessee.

Under section 4 (3) (vii) receipts which are of a casual and non-recurring nature are not liable to be included in the computation of the total income of the assessee; but the rule in express terms does not apply to capital gains, receipts arising from business or the exercise of a profession or vocation and receipts by way of addition to the remuneration of an employee. On the finding recorded by the Tribunal the receipt arose from the business of the assessee, and is not exempt under section 4 (3) (vii).

Appeal by Special Leave from the Judgment and Order dated the 11th March, 1963 of the Calcutta High Court in Income-tax Reference No. 80 of 1959.

S. T. Desai, Senior Advocate (*J. P. Goyal*, Advocate with him), for Appellant.

B. Sen, Senior Advocate (*A. N. Kirpal* and *R. N. Sachthay*, Advocates, with him) for Respondent.

The Judgment of the Court was delivered by

Shah, J.—*M/s. Ram Kumar Agarwalla and Brothers*—hereinafter called "the assessee"—were carrying on business at Calcutta as "sharebrokers, share dealers and

paper merchants". Swadeshi Cotton Mills Ltd.—a public limited company—operates at Kanpur a large unit producing cotton textiles. It was originally managed by a firm of Managing Agents styled M/s. Horseman Brothers. Some time early in 1946 M/s. Horseman Brothers desired to dispose of their shareholding in the company and to part with the managing agency. David Mitchell, a partner of M/s. Lovelock & Lewis—Accountants of the company—and the assessee started joint negotiations with M/s. Horseman Brothers to purchase the controlling interest in the company. About the month of April, 1946 M/s. Mangtaram Jaipuria acting through their partner Anandram Gajadhar were also negotiating to secure the controlling interest in the company. M/s. Mangtaram Jaipuria addressed a letter on 29th April, 1946, to David Mitchell to the following effect :

" With reference to your negotiations to acquire the controlling interest in the Swadeshi Cotton Mills Co., Ltd., we confirm that we and our associates are desirous of purchasing the same and in the event of your securing the same for us and upon your giving up all claims to purchase the same and assigning to us and our associates any interest that you may have acquired therein, we hereby agree to pay you and your colleagues a capital sum of Rs. 6,00,000. Such payment to be made upon completion of the purchase by us."

M/s. Mangtaram Jaipuria also obtained a letter of guarantee for Rs. 6,00,000 from the Imperial Bank of India in favour of David Mitchell. M/s. Mangtaram Jaipuria purchased the shareholding of M/s. Horseman Brothers for Rs. 4,03,00,000. Thereafter the amount of Rs. 6,00,000 was duly paid to David Mitchell, Rowan Hodge and the assessee, and it was divided equally between them each receiving Rs. 2 lakhs. The assessee paid Rs. 25,000 out of their share to one Ratan Lal Goel for "services rendered in the deal" and credited the balance of Rs. 1,75,000 as "brokerage" in their profit and loss account, and submitted a return of income for "the assessment year 1947-48 showing that receipt as income "from brokerage in the course of business." Later the assessee submitted a revised return excluding the amount of Rs. 1,75,000. The Income-tax Officer rejected the claim of the assessee that the amount of Rs. 1,75,000 was a non-recurring casual receipt exempt from tax under section 4 (3) (vii) of the Act or that it was a capital and not revenue receipt. The order was confirmed by the Appellate Assistant Commissioner. On the plea of the assessee that the amount of Rs. 2,00,000 received by them as consideration for agreeing to refrain from carrying on their business and was on that account not taxable as their income, and that in any event it was a non-recurring casual receipt, there was difference of opinion between the two members who constituted the Appellate Tribunal, and the appeal was referred to a third member who remanded the case for a finding on certain matters on which the order of the Appellate Assistant Commissioner was silent. The Appellate Assistant Commissioner then reported that the payment of Rs. 6,00,000 was not made only as an inducement to the assessee to refrain from competition in purchasing the controlling interest in the company, but it was made to remunerate the services rendered by the assessee and their associates in helping M/s. Mangtaram Jaipuria to acquire the controlling interest. The Tribunal agreed with the report of the Appellate Assistant Commissioner and dismissed the appeal. The Tribunal observed :

" He never had the intention or the money to buy the mills worth a few crores. The very fact that he had two other associates will again show that there was no intention of either of these three persons to purchase the mills. Partners of Solicitors and Auditors had no intention of buying the mills. I think that the sum of Rs. 2 lakhs has accrued to assessee as a result of a venture in the nature of trade. Services of Auditors, Brokers and Solicitors have been employed in completing the sale."

The Tribunal submitted a Statement of The Case on the following two questions, on application by the assessee, under section 66 (1) of the Income-tax Act :

" (1) Whether there was any material on record before the President to give a finding to the effect that the contention of the assessee that it intended to buy the mills was without any basis whatsoever ?

(2) Was the receipt in question a revenue receipt from a venture in the nature of trade and has it been rightly brought to tax?"

The High Court of Calcutta held that there was ample material to support the finding of the Tribunal that the receipt in question was a revenue receipt from a venture in the nature of trade. With Special Leave, the assessee has appealed to this Court.

Counsel for the assessee says that the two members of the Tribunal who originally heard the appeal had concurrently held that Rs. 6 lakhs were paid to the assessee and their associates for dissuading them for not competing with M/s. Mangtaram Jaipuria and it was not open to the third member to ignore that finding and to arrive at different conclusion. We are unable to agree with that contention. On a difference of opinion, the appeal in its entirety and not any specific question, was referred to the third member. Again only the accountant member was of the view that the receipt of Rs. 2 lakhs to the assessee arose not in the course of their business, but because they agreed to refrain from competing with M/s. Mangtaram Jaipuria in that firm's attempt to acquire the controlling interest in the company; the judicial member did not accept that view.

The terms of the letter addressed by M/s. Mangtaram Jaipuria to David Mitchell make it abundantly clear that Rs. 6 lakhs were agreed to be paid primarily as remuneration for services to be rendered. The expression "in the event of your securing the same (controlling interest in the Swadeshi Cotton Mills) for us, and upon your giving up all claims to purchase the same, and assigning to us and our associates any interest that you may have acquired, we hereby agree to pay you. . . . sum of Rs. 6,00,000" evidences that object. The Tribunal had also called for a report from the Appellate Assistant Commissioner and that Officer, as we have already observed, expressly recorded that the payment made to the assessee and their associates was for services rendered in acquiring the controlling interest for M/s. Mangtaram Jaipuria and not for dissuading them in competing for the purchase of the shares. The Tribunal accepted the report of the Appellate Assistant Commissioner and observed that the assessee had no intention to buy the controlling interest in the company. The principal business of the assessee was in paper, and they were doing some business in shares and brokerage in shares. The evidence does not disclose how it was intended by the assessee to finance such a large transaction. The Tribunal was apparently of the view that a Solicitor, an Auditor and a firm of sharebrokers and paper merchants could not have been associated in a genuine project of acquiring the controlling interest in one of the largest textile units in the country which was expected to and did cost Rs. 4 crores. The Tribunal had directed that certain persons including Ram Kumar Agarwalla, the principal partner of the assessee, be examined as witnesses. The principal partner of the assessee did not give evidence. Ramgopal Agarwalla another partner of the firm who appeared before the Appellate Assistant Commissioner pleaded that he had no personal knowledge about the details of the negotiations or "as to the financial part of the aspect of the matter, since it was being dealt with by the senior partner Ram Kumar Agarwalla." David Mitchell and Rowen Hodge had it appears, left India and they also could not be examined. The conclusion recorded by the Tribunal that the assessee, David Mitchell and Rowen Hodge had, no intention to acquire the controlling interest, but were seeking to associate themselves in a venture in the nature of trade, cannot in the circumstances be said to be without evidence. The conclusion that the assessee and their two associates received Rs. 6,00,000 not in consideration of refraining from competing in the purchase of the controlling interest, but as remuneration for services rendered is based on evidence before the Tribunal. The receipt must therefore be regarded as a revenue receipt earned in the course of the business of the assessee.

It is unnecessary to make a detailed reference to the decisions which were cited at the Bar, e.g., *Higgs v. Oliver*¹ and *Commissioner of Income-tax, Bombay v. The Mills Store Co., Karachi*². In *Higgs case*¹ a professional actor who had agreed to give his exclusive services to a film company in consideration of a fixed sum, and

1. (1952) 33 T.C. 136.

2. (1941) 9 I.T.R. 642 : I.L.R. (1941) Kar.

proportion of the net profits from exploitation of a film, was, after the agreement was fulfilled, given a sum of £15,000 as consideration for an undertaking not to act, produce or direct any film for any person for a period of eighteen months. It was held that the amount paid was not for carrying on business, but for refraining from carrying on the business and was not taxable. In the *Mills Store Company's case*¹ under an agreement for a stated consideration the assessee-company parted with the oil tanks and installations and other structures and goodwill and leasehold rights held by it in respect of the land on which its business of storing petroleum and petroleum products was carried, and agreed not to import petroleum for ten years and not to act on behalf of anyone else as importers of petroleum for five years. By another agreement in consideration of extending the latter restriction to ten years, the assessee was paid Rs. 10,000 annually during the subsistence of the restriction, it was held by the Chief Court of Sind that the sum of Rs. 10,000 was not the direct result of the profit or gains accruing to the assessees as a result of the business actually carried on by them, and did not fall under the head "Profits and gains of business, profession or vocation." These cases have, on the findings recorded by the Tribunal, no relevance.

Under section 4 (3) (vii) receipts which are of a casual and non-recurring nature are not liable to be included in the computation of the total income of the assessee; but the rule in express terms does not apply to capital gains, receipts arising from business or the exercise of a profession or vocation and receipts by way of addition to the remuneration of an employee. On the finding recorded by the Tribunal, the receipt arose from the business of the assessees, and is not exempt under section 4 (3) (vii).

The appeal therefore fails and is dismissed with costs.

T.K.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, RAGHUBAR DAYAL AND V. RAMASWAMI, JJ.

Abdul Karim Khan and others

.. *Appellants**

v.

Municipal Committee, Raipur

.. *Respondent.*

Madhya Pradesh Public Trust Act (XXX of 1951), sections 4, 5 and 8 (1) and 9—Scope—Property registered under the Act as belonging to a public trust—Effect—If conclusive against a person claiming title to the same—Scope of enquiry under section 5—Section 8 (1) by whom can be invoked.

The fact that a certain property is registered by the Registrar of Public Trusts under the M.P. Public Trust Act as belonging to a public trust is not conclusive against the claim of a person who claims title to the same though such person has not filed his objections before the Registrar in response to a notice calling upon all persons interested in the property to show cause why it should not be so registered and has not filed a suit under section 8 (1), within the time specified therein, challenging the order of the Registrar.

The M.P. Public Trust Act is concerned with the registration of public, religious and charitable trusts in the State of Madhya Pradesh and the enquiry which its relevant provisions contemplate is an enquiry into the question as to whether the trust in question is public or private. The enquiry permitted by the said provisions does not take within its sweep questions as to whether the property belongs to a private individual and is not the subject-matter of any trust at all. It cannot be ignored that the Registrar holds a kind of summary enquiry and the points which can fall within his jurisdiction are indicated by clauses (i) to (x) of section 4 (3). Therefore, *prima facie*, it appears unreasonable to suggest that contested questions of title can be said to fall within the enquiry which the Registrar is authorised to hold under section 5 of the Act.

Besides, it is significant that the only persons who are required to file their objections in response to a notice issued by the Registrar under section 5 (2) inviting all persons interested to prefer objec-

1. (1941) 9 I.T.R. 642 : I.L.R. (1941) Kar. 512 : A.I.R. 1942 Sind 53.

* C.A. No. 871 of 1962.

8th March, 1965.

tions, are persons interested in the public trust and not persons who dispute the existence of the trust or who challenge the allegation that any property belongs to the said trust. It is only persons interested in the public trust, such as beneficiaries or others who claim a right to manage the trust, who can file objections, and it is objections of this character proceeding from persons belonging to this limited class that fall to be considered by the Registrar.

It is true that section 8 (1) permits a suit to be filed by a person having interest in the public trust or any property found to be trust property. The interest to which this section refers must be read in the light of section 5 (2) to be the interest of a beneficiary or the interest of a person who claims the right to maintain the trust or any other interest of a similar character. It is not the interest which is adverse to the trust set up by a party who does not claim any relation with the trust at all.

Then again, the right to file a suit to which section 8 (1) refers is given to persons who are aggrieved by any finding of the Registrar. Having regard to the fact that the proceedings before the Registrar are in the nature of proceedings before a civil Court it would be illogical to hold that a person who was not a party to the proceedings can be said to be aggrieved by the findings of the Registrar. The normal judicial concept of a person aggrieved by any order necessarily postulates that the said person must be a party to the proceedings in which the order was passed and by which he feels aggrieved. It would be plainly unreasonable to assume that though a person is not a party to the proceedings and cannot participate in them by way of filing objections, he would still be bound to file a suit within the period prescribed by section 8 (1) if the property in which he claims an exclusive title is held by the Registrar to belong to a public trust.

Similarly, the right to prefer an appeal against the Registrar's order prescribed by section 4 (5) necessarily implies that the person must be a party to the proceedings before the Registrar.

Appeal by Special Leave from the Judgment and Decree dated 13th August, 1959 of the Madhya Pradesh High Court in Second Appeal No. 294 of 1959.

S. P. Sinha and M. I. Khowaja, Advocates, for Appellants.

S. T. Desai, Senior Advocate (*A. G. Ratnaparkhi*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Gajendragadkar, C.J.—This appeal arises from a suit filed by the appellants who are the representatives of residents of Nayapara Ward in particular and of the Muslim community of Raipur in general, in which they claimed an injunction restraining the respondent, Municipal Committee of Raipur, from committing acts of encroachment on their rights and the rights of the Muslim community in holding *Urs* and other ceremonies on the plot in suit. It appears that at Raipur, there is a piece of land called "Fazle Karim's Bada" Khassra No. 649 measuring 4.62 acres. Inside this *Bada*, there are three or four Municipal schools. The office of the Electre Power House is also located in one corner of the land. Behind the School, there is a *Pakka* platform known as "Syed Baba's Mazar". Near the Electric Power House, there is a raised earth platform on which there is a flag. This flag is called "Madar Sahib's Jhanda". Surrounding this land, there is a brick wall which was made by the respondent several years past. According to the plaint, *Urs* function is held every year in front of Syed Baba's Mazar for the last several years. On or about the 22nd October, 1956, the employees of the respondent started digging foundation at the places A, B, C and D shown on the map attached to the plaint. These digging operations were commenced under the directions of the respondent, because the respondent intended to construct another school building on the plot. The appellants then served a notice on the respondent to desist from carrying on the digging operations on the ground that the property on which the said operations were being carried out, was a part of the Wakf property. When the respondent did not comply with the requisition contained in the said notice, the present suit was filed by the appellants on 29th October, 1956. This suit has been filed under Order 1, rule 8 of the Code of Civil Procedure.

The case of the appellants is that the plot of land in suit was old *Kabrasthar* known as "Chuchu's Takia", and is a permanent inalienable wakf property. On this plot are tombs of renowned saints like Syed Baba, and Madar Sahib's *Jnahda*

On a part of the plot, every year *Urs* and other religious functions are performed. In fact, the land has been registered under the Madhya Pradesh Public Trust Act (XXX of 1951) (hereinafter called the Act) as trust property; as such, the respondent can claim no right or title to the said land. That is the basis on which the appellants claimed injunction against the respondent.

The respondent disputed this claim. It was urged in the written statement filed by the respondent that the land was never and could never be *wakf* property. There was no tomb on the land. There are only two so-called tombs, but they have no significance. The *Urs* is of very recent origin and it is allowed to be held with the licence of the respondent. The plot originally belonged to private persons and had been acquired by the Government in land acquisition proceedings in 1910-11. The respondent got the said land from the Government in 1922. In 1932-33, the Deputy Commissioner fixed rent of the land which is being paid by the respondent ever since. On this land, the respondent has constructed some schools, and a part of the land which is lying vacant is allowed to be used by the people of neighbourhood for traffic. The respondent thus has full right to construct on its own plot of land. The representative character of the appellants was disputed by the respondent and their right to file the present suit was challenged.

On these pleadings, several issues were framed by the learned trial Judge. They covered the title of the appellants, the title of the respondent, and the right of the appellants to file the suit. The issue with which we are concerned in the present appeal related to the registration of the plot in the register kept under the relevant provisions of the Act and its effect. The appellant's contention was that the said registration was conclusive against the respondent and in favour of the appellants' claim. This contention was rejected by the trial Judge, with the result that the appellant's suit was dismissed. With the finding recorded by the learned trial Judge on the other issues we are not concerned in the present appeal.

The matter then went in appeal, and the appellate Court confirmed the conclusions recorded by the trial Court and dismissed the appeal. The appellants challenged the correctness of the said appellate decree by preferring a second appeal in the High Court of Madhya Pradesh, but the second appeal also failed, and that has brought the appellants to this Court by Special Leave. Thus, it would be noticed that the appellants have failed on the merits of their claim in all the Courts below, and the technical point raised by them that the registration of the plot under the relevant provisions of the Act concluded the matter, has also been rejected. It is this last point which has been urged before us by Mr. Sinha on behalf of the appellants.

Before we deal with this point, however, it would be relevant to mention how the property came to be entered in the register kept under the relevant provisions of the Act. The record shows that the Masjid Nayapara, Raipur, had been entered in the register as a public trust on 25th June, 1954, in Case No. 23-XXX-iii/7 of 1952-53. Certain properties were entered in the said register in respect of this trust. In 1956, Abdul Karim, Manawali Masjid Nayapara, Raipur applied to the Sub-Divisional Officer, Raipur alleging that the property now in suit also belonged to the public trust and should be included amongst its properties. On this application, public notice was issued calling upon persons interested in the property to show cause why it should not be added to the properties of the *wakf*. No objection was, however, received; and on 23rd October, 1956 the Sub-Divisional Officer reported that the property be shown against the trust. The said report was sanctioned by the Registrar, Public Trusts on 22nd April, 1957. That is how the property came to be registered as belonging to the public trust, and it is on this entry that the whole argument of the appellants is based.

In considering the validity of the contention raised by Mr. Sinha before us it is necessary to examine broadly the scheme of the Act and the material provisions on which Mr. Sinha relies. The Act was passed in 1951 to regulate and to make better provision for the administration of public religious and charitable trusts in the State of Madhya Pradesh. Section 2 (4) of the Act defines a "public trust"

and section 2 (8) defines a "wakf." "Working trustee" is defined by section 2 (9). Section 3 (1) provides that the Deputy Commissioner shall be the Registrar of Public Trusts in respect of every public trust; and section 3 (2) imposes on the Registrar the obligation to maintain a register of public trusts, and such other books and registers and in such form as may be prescribed. Section 4 (1) deals with the registration of public trusts and it requires that within three months from the date on which the said section comes into force in any area or from the date on which a public trust is created, whichever is later, the working trustee of every public trust shall apply to the Registrar having jurisdiction for the registration of the public trust. Section 4 (3) lays down the particulars which have to be stated by the application which is required to be made under section 4 (1). All these particulars are in relation to the nature of the trust, its properties, the mode of succession to the office of the trustees, and other allied matters. Section 4 (4) empowers the Registrar to decide the merits of the application, while section 4 (5) provides for an appeal against his decision which is required to be filed within 30 days of the order. Mr. Sinha relies on a specific provision contained in section 4 (5) which says that subject to the decision in such appeal, the order of the Registrar under sub-section (4) shall be final. Section 4 (6) requires the signing and verification of the application in the manner laid down in the Code of Civil Procedure for signing and verifying plaints.

That takes us to section 5 which deals with the enquiry to be held by the Registrar on the application made before him under section 4 (1). Eight points are set down under section 5 (1) which the Registrar has to consider. Section 5 (2) lays down that the Registrar shall give in the prescribed manner public notice of the inquiry proposed to be made under sub-section (1) and invite all persons interested in the public trust under inquiry to prefer objections, if any, in respect of such trust. Under section 6, the Registrar has to make his findings on the points specified by section 5 (1); and under section 7, the Registrar causes entries to be made in the register in accordance with his findings. Section 7 (2) naturally lays down that the entries made under section 7 (1) shall be final and conclusive. Section 8 (1) allows a civil suit to be filed against the findings of the Registrar within six months from the date of the publication of the notice under section 7 (1); such a suit can be filed by a working trustee or a person having interest in a public trust or any property found to be trust property. Section 9 permits applications to be made for change in the entries recorded in the register. It will be recalled that the application which was made in 1956 by Abdul Karim was under the provisions of section 9 (1). If an application is made for change in the entries as, for instance, for adding to the list of properties belonging to the trust, a proceeding has to be taken for making the said change and this is prescribed by section 9 (2). Section 9 (3) makes the provisions of section 8 applicable to any finding under section 9 as they would apply to a finding under section 6. These provisions are contained in Chapter II of the Act. Chapter III deals with the management of trust property; Chapter IV with the problem of audit; Chapter V with control; and Chapter VI contains miscellaneous provisions, including section 35 which confers the rule-making power on the State Government. That, broadly stated, is the nature of the scheme of the Act and the material provisions which fall to be considered in the present appeal.

Mr. Sinha relies on the fact that under section 4 (5) of the Act, the decision of the Registrar is made final, subject to the appellate decision, if any; and he also refers to the right of instituting a suit reserved by section 8. His argument is that if any person who claims interest in the property which is alleged to be trust property fails to satisfy the Registrar about his claim, he can file a suit under section 8 (1). Section 8 (1) allows a suit to be filed, subject to the conditions prescribed by it, and the right to file such a suit is given to a working trustee, or a person having interest in a public trust or any property found to be trust property. The respondent is interested in the property in suit which is found to be trust property, and since it did not avail itself of the right to file a suit within the specified time, the order passed by the Registrar must be held to be final and conclusive against its claim. If finality does not attach to such an order even after six months have expired within the

meaning of section 8 (1), then the provisions contained in section 4 (5) will serve no purpose whatever. That is the manner in which Mr. Sinha has presented his case before us.

We are not impressed by this argument. In testing the validity of this argument, we must bear in mind the important fact that the Act is concerned with the registration of public, religious and charitable trusts in the State of Madhya Pradesh, and the enquiry which its relevant provisions contemplate is an enquiry into the question as to whether the trust in question is public or private. The enquiry permitted by the said provisions does not take within its sweep questions as to whether the property belongs to a private individual and is not the subject-matter of any trust at all. It cannot be ignored that the Registrar who, no doubt, is given the powers of a civil Court under section 28 of the Act, holds a kind of summary enquiry and the points which can fall within his jurisdiction are indicated by clauses (i) to (x) of section 4 (3). Therefore, *prima facie*, it appears unreasonable to suggest that contested questions of title, such as those which have arisen in the present case, can be said to fall within the enquiry which the Registrar is authorised to hold under section 5 of the Act.

Besides, it is significant that the only persons who are required to file their objections in response to a notice issued by the Registrar on receiving an application made under section 4 (1), are persons interested in the public trust—not persons who dispute the existence of the trust or who challenge the allegation that any property belongs to the said trust. It is only persons interested in the public trust, such as beneficiaries or others who claim a right to manage the trust, who can file objections and it is objections of this character proceeding from persons belonging to this limited class that fall to be considered by the Registrar. It cannot be said that the respondent falls within this class; and so, it would be idle to contend that it was the duty of the respondent to have filed objections under section 5 (2).

It is true, section 8 (1) permits a suit to be filed by a person having interest in the public trust or any property found to be trust property. The interest to which this section refers must be read in the light of section 5 (2) to be the interest of a beneficiary or the interest of a person who claims the right to maintain the trust or any other interest of a similar character. It is not the interest which is adverse to the trust set up by a party who does not claim any relation with the trust at all. That is why we think the finality on which Mr. Sinha's argument is based cannot avail him against the respondent inasmuch as the respondent was not a party to the proceedings and could not have filed any objections in the said proceedings.

Then again, the right to file a suit to which section 8 (1) refers is given to persons who are aggrieved by any finding of the Registrar. Having regard to the fact that the proceedings before the Registrar are in the nature of proceedings before a civil Court, it would be illogical to hold that the respondent who was not a party to the proceedings can be said to be aggrieved by the findings of the Registrar. The normal judicial concept of a person aggrieved by any order necessarily postulates that the said person must be a party to the proceedings in which the order was passed and by which he feels aggrieved. It is unnecessary to emphasise that it would be plainly unreasonable to assume that though a person is not a party to the proceedings and cannot participate in them by way of filing objections, he would still be found to file a suit within the period prescribed by section 8 (1) if the property in which he claims an exclusive title is held by the Registrar to belong to a public trust.

Similarly, the right to prefer an appeal against the Registrar's order prescribed by section 4 (5) necessarily implies that the person must be a party to the proceedings before the Registrar; otherwise how would he know about the order? Like section 8 (1), section 4 (5) also seems to be confined in its operation to persons who are before the Registrar, or who could have appeared before the Registrar under section 5 (2). The whole scheme is clear; the Registrar enquires into the question as to whether a trust is private or public, and deals with the points specifically enu-

merated by section 4 (3). Therefore, we have no hesitation in holding that the Courts below were right in coming to the conclusion that the fact that the property now in suit was added to the list of properties belonging to the wakf, cannot affect the respondent's title to it. On the merits, all the Courts below have rejected the appellant's case and have upheld the pleas raised by the respondent in defence.

The result is, the appeal fails and is dismissed with costs.

V.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, M. Hidayatullah and V. Ramaswami, JJ.

Union of India

.. *Appellant**

v.

Watkins Mayor & Co.

.. *Respondent.*

Contract Act (IX of 1872), section 148—Iron sheets belonging to defendant supplied to plaintiff under a contract by latter to manufacture drums for the defendant—Later contract cancelled—Suit by plaintiff as bailee for compensation for storage of iron sheets in its godown—Measure of—Notice by plaintiff claiming storage charges at certain rate—No reply from defendant—If amounts to implied undertaking to pay godown rent at that rate.

Limitation Act (IX of 1908), Articles 61 and 120—Contract by plaintiff to manufacture finished product out of raw materials supplied by defendant—Raw materials stocked in plaintiff's godown—Later contract cancelled—Suit by plaintiff claiming compensation as bailee for storage and other incidental charges—If governed by Article 61 or 120—Claim under different heads if can be split up for the purpose of applying the bar of limitation.

Interest Act (XXXII of 1839)—Suit for compensation—Interest for the period prior to institution of the suit—When can be awarded.

The defendant, the Union of India, entered into a contract with the plaintiff to supply 600 tons of iron sheets out of which the plaintiff agreed to manufacture and deliver drums to the defendant. In pursuance of this agreement the defendant supplied the iron sheets which were stocked in the premises of the plaintiff's factory in July, 1944. In August, 1944, however, the defendant cancelled the contract but the iron sheets supplied by it were not removed till May, 1949. The plaintiff filed, in 1952, a suit against the defendant on the ground that the plaintiff acted as bailees of the goods of the defendant from July, 1944 to May, 1949 and as such was entitled to compensation under the following heads : (a) godown rent, (b) chowkidar's salary, (c) terminal tax paid, (d) cartage, (e) unloading charges, (f) coolage for storing iron in godown and (g) interest on the sums payable under items (a) to (f). On the questions (1) whether the lower appellate Court was justified in fixing Rs. 300 per month as godown charges, (2) whether the suit was governed by Article 61 or 120 of the Limitation Act (IX of 1908) and whether the plaintiff's claim with respect to items (c) to (f) was barred by limitation and (3) whether the appellant was entitled to the interest which he claimed under item (g).

Held, (i) under the circumstances of the case the lower appellate Court was justified in fixing the godown rent at Rs. 300 per month. Merely because the plaintiff had claimed by a notice stora charges at the rate of Rs. 4 per ton per month and there was silence on the part of the defendant, it cannot be deemed that there was acquiescence on the part of the defendant and that there was an implied undertaking on its part to pay godown rent at that rate;

(ii) the suit was governed by Article 120 and not by Article 61 of the Limitation Act and the claim of the plaintiff in regard to items (c) to (f) was not barred by time. The transaction of bailment between the parties was a single and indivisible transaction and the claim for compensation made by the plaintiff could not be split up into different items for applying the bar of limitation ; and

(iii) the plaintiff was not entitled to the interest claimed by him.

It is well-established that interest may be awarded for the period prior to the date of the institution of the suit if there is an agreement for the payment of interest at fixed rate or if interest is payable by the usage of trade having the force of law or under the provisions of any substantive law entitling the plaintiff to recover interest, as for instance section 80 of the Negotiable Instruments Act, 1881. There is in the present case neither usage nor any contract to justify the award of interest. Nor is interest paya-

ble by virtue of any provision of the law governing the case. Under the Interest Act, 1839, the Court may allow interest to the plaintiff if the amount claimed is a sum certain which is payable at a certain time by virtue of a written instrument. But the amount claimed in the instant case is not a sum certain but compensation for unliquidated amount. The provision in the Interest Act that "interest shall be payable in all cases in which it is now payable by law" only applies to cases in which the Court of Equity exercises jurisdiction to allow interest.

Appeals from the Judgment and Decree dated 31st March, 1960 of the Punjab High Court in Regular First Appeal No. 121 of 1953.

N. D. Karkhanis and *R. N. Sachthy*, Advocates, for the Appellant. (In Civil Appeal No. 43 of 1963) and Respondent (In Civil Appeal No. 44 of 1963).

C. B. Agarwala, Senior Advocate (*B. P. Maheshwari*, Advocate, with him), for Respondent (In Civil Appeal No. 43 of 1963) and Appellant (In Civil Appeal No. 44 of 1963).

The Judgment of the Court was delivered by

Ramaswami, J.—Both these appeals are brought from the judgment and decree of the High Court of Judicature of the State of Punjab dated 31st March, 1960 in Regular First Appeal No. 121 of 1953 by certificates granted by the High Court under Article 133 (1) (a) of the Constitution.

The plaintiff brought the suit claiming a sum of Rs. 1,07,700 and odd from the Union of India as compensation for storage of over 600 tons of iron sheets for the period from July, 1944 to May, 1949. The plaintiff alleged that on 11th February, 1944 the Union of India placed an indent for the supply of 120,000 drums. The raw materials comprising of 600 tons of P.C.R.C.A. iron sheets were to be supplied by the defendant to the plaintiff and the agreement was that the plaintiff was to be paid fifteen annas as the cost of fabrication for each drum. In pursuance of the contract the defendant supplied 600 tons of iron sheets to the plaintiff in July, 1944. The sheets were unloaded and stocked on the premises of the plaintiff's factory at Jullundur. But, on 21st August, 1944, the defendant cancelled the contract by its letter—Exhibit P-18, dated 21st August, 1944 and the plaintiff was informed that further communication would follow in regard to the disposal of the materials supplied to the plaintiff under the contract. The plaintiff served notices dated 27th July, 1945—Exhibit D-1 and 28th April, 1947—Exhibit D-2, asking the defendant to remove the goods. The goods were removed in small quantities in accordance with the release orders issued and the last lot weighing 282 tons was removed on 30th May, 1949. After some correspondence between the plaintiff and the Union of India, the plaintiff filed the present suit on 29th July, 1952 on the allegation that the plaintiff acted as bailees of the goods of the defendant from July, 1944 to May, 1949 and was entitled to the sum of Rs. 1,07,700-5-0 as follows :

	Rs.	A.	P.
(a) Godown rent from July, 1944 to end of May, 1949 at Rs. 4 per on per month ..	93,231	0	0
(b) Chowkidar's salary, Watch and Ward ..	7,004	0	0
(c) Terminal Tax paid ..	760	0	0
(d) Cartage from Railway Station to Godown of the Factory ..	2,105	14	0
(e) Unloading charges ..	825	5	0
(f) Cooliage to store 600 tons in godown ..	800	0	0
(g) Interest on the sums mentioned in clauses (c) to (f) at 6 per cent. ..	2,974	2	0

The suit was resisted by the defendant on the ground that there was no completed contract of bailment between the parties and that, in any event, the claim of the plaintiff regarding the charge for storage was excessive. It was also pleaded that the suit was barred by limitation. By its judgment dated 4th May, 1953 the trial Court granted the plaintiff a decree for a sum of Rs. 9,440 against the Union of India. The plaintiff took the matter in appeal before the Punjab High Court in Regular First Appeal No. 121 of 1953. By its judgment dated 31st March, 1960, the High Court partly allowed the appeal of the plaintiff and granted him a decree for Rs. 27,525-5-0 against the defendant as detailed below :

	Rs.	A.	P.
(a) Godown rent at Rs. 300 per month for a period of 59 months from July, 1944 to the end of May, 1949 ..	17,700	0	0
(b) Chowkidar's salary ..	2,360	0	0
(c) Terminal Tax ..	760	0	0
(d) Cartage ..	2,105	14	0
(e) Unloading charges ..	825	5	0
(f) Cooliage ..	800	0	0
(g) Interest at 6% per annum on items (c) to (f) as Rs. 2,974-2-0 claimed in the plaint ..	2,974	2	0
	<hr/>	<hr/>	<hr/>
	27,525	5	0

Aggrieved by the judgment and decree of the High Court dated 31st March, 1960 both the plaintiff and the defendant have presented appeals to this Court.

In Civil Appeal No. 43 of 1963 it is contended on behalf of the appellant that the storage charges granted at Rs. 300 p.m. by the High Court were not justified upon the evidence in the case. It was submitted that the report of Mr. J. S. Mongia dated 5th August, 1947 was taken by the High Court as the basis of its calculation and the fair rent payable to the plaintiff ought not to have exceeded the rate of Rs. 200 p.m. mentioned in Mr. Mongia's report. We do not consider there is any substance in this submission. Mr. J. S. Mongia was deputed by the defendant to conduct an enquiry and make a report with regard to storage charges claimed by the plaintiff. It appears from his report—Exhibit D-19, dated 5th August, 1947, that Mr. Mongia calculated that the storage of iron sheets took about 1,485 cubic feet of space. It is true that Mr. Mongia considered that the fair rent payable was Rs. 200 p.m. but the High Court increased the rate in view of the fact that at the time of this inspection some of the iron sheets had been already removed. There is evidence that at the time of Mr. Mongia's inspection the weight of iron sheets stored was 498 tons, though the quantity of iron sheets originally stored was 600 tons. The High Court has also taken into consideration the additional services rendered by the plaintiff in looking after the iron sheets during the period of storage. We do not, therefore, find it possible to accept the contention of the appellant that the High Court was not justified in fixing the rent at Rs. 300 p.m. as godown charges. As regards the floor space, the High Court has remarked that the calculation of the trial Judge for the surface area was not correct. It appears that the trial Court accepted the evidence of Man Mohan Lal—D.W. 7—that the floor space occupied by 600 tons of iron sheets could not be more than 2,600 sq.ft., but the High Court pointed out that this calculation was fallacious, because a space of 1 foot was allowed between the bundles of iron sheets and this was hardly sufficient for the operation of "overturning" the bundles of sheets in order to prevent rust. Taking all the factors into consideration including the report of Mr. Mongia, the High Court reached the conclusion that the rent of Rs. 300 p.m. was a reasonable charge. We see no reason for taking a different view from the High Court on this aspect of the case.

It was next argued on behalf of the appellant that the suit was governed by Article 61 of the Limitation Act and the claim of the plaintiff in regard to items (c) to (f) was barred by time. We do not accept this argument as correct. The transaction of bailment between the parties was a single and indivisible transaction and the claim of compensation made by the plaintiff cannot be split up into different items for applying the bar of limitation. We are also of the opinion that the provisions of Article 61 of the Limitation Act do not apply to the present case. The High Court was right in taking the view that the suit was governed by Article 120 of the Limitation Act and that the plaintiff was not barred under that Article.

It was finally contended on behalf of the appellant that, in any event, the plaintiff was not entitled to a decree for interest to the extent of Rs. 2,974-2-0 as claimed in the plaint. In our opinion, the argument of learned Counsel for the appellant on this point is well-founded and must be accepted as correct. It is well-established.

that interest may be awarded for the period prior to the date of the institution of the suit if there is an agreement for the payment of interest at a fixed rate or if interest is payable by the usage of trade having the force of law, or under the provisions of any substantive law entitling the plaintiff to recover interest, as for instance, under section 80 of the Negotiable Instruments Act, 1881, the Court may award interest at the rate of 6 per cent. per annum, when no rate of interest is specified in the promissory note or bill of exchange. There is in the present case neither usage nor any contract, express or implied, to justify the award of interest. Nor is interest payable by virtue of any provision of the law governing the case. Under the Interest Act, 1839, the Court may allow interest to the plaintiff if the amount claimed is a sum certain which is payable at a certain time by virtue of a written instrument. But it is conceded that the amount claimed in this case is not a sum certain but compensation for unliquidated amount. On behalf of the respondent it was submitted by Mr. Aggarwala that interest may be awarded under the Interest Act which contains a provision that "interest shall be payable in all cases in which it is now payable by law." But this provision only applies to cases in which the Court of Equity exercises jurisdiction to allow interest. The legal position has been explained by the Judicial Committee in *Bengal Nagpur Railway Company, Limited v. Rattanji Ramji and others*¹, as follows :

"As observed by Lord Tomlin in *Maine and New Brunswick Electrical Power Co. v. Hart*², 'In order to invoke a rule of equity it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction, as, for example, the non-performance of a contract of which equity can give specific performance'."

The decision of the Judicial Committee in *Bengal Nagpur Railway Co., Ltd. v. Rattanji Ramji and others*¹, was relied upon by this Court in *Seth Thawardas Pherumal v. The Union of India*³, in rejecting a claim for interest. In that case, a contractor entered into a contract with the Dominion of India for the supply of bricks. A clause in the contract required all disputes arising out of or relating to the contract to be referred to arbitration. The dispute having arisen, the matter was referred to arbitration and the arbitrator gave an award in the contractor's favour. The Union of India which has succeeded to the rights and obligations of the Dominion, contested the award on various grounds one of which was the liability to pay interest on the amount awarded. Bose, J., in delivering the judgment of the Court, observed that the interest awarded to the contractor could not, in law, be awarded. He pointed out that the arbitrator is not a Court within the meaning of the Interest Act, 1839 and, in any event, interest could only be awarded if there was a debt or a sum certain payable at a certain time or otherwise by virtue of some written contract and there must have been a demand in writing stating that interest will be demanded from the date of the demand.

The same view has been expressed by this Court in a later case — *Union of India v. Rallia Ram*⁴—in which the respondent had claimed from the Dominion of India, compensation in respect of the goods delivered to him under the contract interest on the amounts raised by him for carrying out the contract and for incidental expenses incurred by him after delivery of the goods. The dispute was referred to arbitration and the award granted to the respondent three sums of money on the following heads ; (1) loss suffered by the respondent in respect of goods not returned by him computed on the basis of difference between the price paid and price received by him on sale, (2) incidental charges on account of expenses incurred on advertisement, storage, agency commission, etc., (3) interest on sum refunded to respondent in respect of returned packets. It was held by this Court that the award of interest under the third head could not be sustained as the contract did not provide for payment of interest in respect of amounts paid by the respondent if the contract fell through. Nor could interest be awarded under section 61 of the

1. (1937) L.R. 65 I.A. 66 at p. 72 : (1938) 1 M.L.J. 640 : A.I.R. 1938 P.C. 67.
2. L.R. (1929) A.C. 631, 640.

3. (1955) S.C.J. 445 : (1955) 2 M.L.J. (S.C.) 493 : (1955) 2 S.C.R. 48 : A.I.R. 1955 S.C. 468.

4. (1964) 3 S.C.R. 164 : A.I.R. 1963 S.C. 1685.

Sale of Goods Act or under the Interest Act on grounds of equity. In the absence of any usage or contract express or implied, or of any provision of law to justify the award of interest, the arbitrator cannot award interest by way of damages caused to the respondent for wrongful detention of money. Applying the principle to the present case, it is clear that the plaintiff is not entitled to a decree for interest to the extent of Rs. 2,974/2/- claimed by him in the plaint and, therefore, the decree granted by the High Court in favour of the plaintiff should be reduced to this extent.

In Civil Appeal No. 44 of 1963 preferred on behalf of the plaintiff the main argument put forward by Mr. C. B. Aggarwala was in regard to the calculation of the storage charges for the iron sheets. It was pointed out that the plaintiff had given notice to the defendant claiming rent at the rate of Rs. 4 per ton per month and there was no protest on behalf of the defendant and, therefore, it must be taken that there was an implied agreement between the parties that rent would be paid at that rate *i.e.*, at the rate of Rs. 2,400 per month. We do not think there is any warrant for this submission. Merely because the plaintiff had claimed storage charges at the rate of Rs. 4 per ton per month and there was silence on the part of the defendant, it cannot be deemed that there was acquiescence on the part of the defendant and that there was an implied undertaking on its part to pay godown rent at that rate. We have already discussed the question of reasonable compensation to the plaintiff for storage of the iron sheets and, for reasons already given, we hold that the finding of the High Court on this issue is correct.

In the result, we hold that the plaintiff is entitled to the decree with regard to items (a) to (f) as mentioned in the judgment of the High Court, *i.e.*,:

(a) Godown rent at Rs. 300 per month for a period of 59 months from July, 1944 to the end of May, 1949	.. Rs. 17,700/-
(b) Chowkidar's salary	.. Rs. 2,360/-
(c) Terminal Tax	.. Rs. 760/-
(d) Cartage	.. Rs. 2,105/14/-
(e) Unloading charges	.. Rs. 825/5/-
(f) Cooliage	.. Rs. 800/-
	<hr/> Rs. 24,551/3/- <hr/>

and not to interest *i.e.*, item (g). We accordingly allow Civil Appeal No. 43 of 1963 and modify the judgment and decree of the High Court to the extent indicated above. Civil Appeal No. 44 of 1963 is dismissed. There will be no order as to costs of both these appeals.

V.K.

Order accordingly.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT :—K. SUBBA RAO, J. C. SHAH AND R. S. BACHAWAT, JJ.

The Calcutta Tramways Co., Ltd.

.. Appellant*

v.

The Corporation of Calcutta

.. Respondent.

Calcutta Tramways Act (W.B. Act XXV of 1951), section 5, proviso—Scope—Proper construction.

Under section 5 of the Calcutta Tramways Act the Government of West Bengal is statutorily substituted for the Corporation of Calcutta or its predecessors-in-interest in the various agreements set out in the Second Schedule to that Act. The fiction is a well defined one. The Government replaces the Corporation and its predecessors as a party to the agreements unless the subject-matter or the context otherwise requires. The natural presumption is that but for the proviso the enacting part of the section would have included the subject-matter of the proviso also. The proviso to section

saves from the operation of the substantive section the sums payable under any such agreements to any such bodies mentioned therein : It excludes the operation of the fiction in respect of such sums. In respect of the said sums payable the agreement entered into with the said bodies will remain intact as if the Act had not been passed ; that is to say, the Corporation of Calcutta would still continue to be a party to the said agreements for the said purpose. The relevant agreements provided for the recovery of the rents and also for the procedure for the recovery of the sums so payable in accordance with the terms of the arbitration clauses of the agreements. Had not the Act been passed, it cannot be denied that the Corporation, if a dispute arose in regard to the rent, could have referred the dispute to arbitration. The substantive right to the payment of rent and the procedural one to have any dispute arising in respect of that right referred to arbitration embodied in the agreements are interconnected and are not severable. It cannot therefore be contended that the Corporation of Calcutta could not rely on the arbitration clauses of the agreements in question and refer the disputes arising in respect of the sums payable in terms of the said agreements to arbitration. To preserve the substantive right and to withhold the procedural right to enforce it, is to save the right and to deny the remedy.

Appeal by Special Leave from the Judgment and Order dated 13th February, 1963 of the Calcutta High Court in Award Case No. 8 of 1963.

A. V. Viswanatha Sastri, Senior Advocate (*D. N. Gupta*, Advocate, with him), for Appellant.

S. T. Desai, Senior Advocate, (*P. K. Mukherjee*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Subba Rao, J.—On or about 2nd October, 1879, the Corporation of the town of Calcutta incorporated under Bengal Act IV of 1876 entered into an agreement in writing with Dillwyn Parrish, Alfresh Parrish and Robinson Souttar, hereinafter called the grantees, whereunder the Corporation granted to the said grantees the right to construct, maintain and use certain tramways in Calcutta on payment of certain rents as provided in the said agreement. The agreement contained an arbitration clause which provided for referring any disputes arising under the said agreement to arbitration in the manner prescribed thereunder. The said agreement further provided in clause 28 that the words "the said Corporation" would include the Corporation and its successors. Different agreements were entered into between the successors of the Corporation of Calcutta and the grantees from time to time, namely, on 22nd November, 1879, 2nd September, 1893, and 9th December, 1899, and were confirmed by appropriate Acts. In all these agreements the appellant's predecessor-in-interest agreed to pay the rents to the respondent's predecessor-in-interest in respect of the tramways constructed, maintained and used by them. All the said agreements contained an arbitration clause similar to that contained in the first agreement. The Corporation of Calcutta is now the successor of the properties of the Corporation of the town of Calcutta constituted under the Bengal Act IV of 1876. It was constituted by Bengal Act II of 1888. The appellant *i.e.*, the Calcutta Tramways Co., Ltd., is the successor or the assignee of the said grantees. On 30th August, 1951, the State of West Bengal entered into an agreement with the appellant whereby the Government agreed to purchase the undertaking of the appellant as provided in the said agreement. The said agreement was subject to an Act being passed by the appropriate Legislature satisfying the agreement and giving effect to it. The Calcutta Tramways Act, 1951 (W.B. Act XXV of 1951) was passed and it came into effect on 18th October, 1951. Under that Act the Government of West Bengal was practically substituted for the Corporation of Calcutta under the various agreements subject to a reservation that any sums payable under the said agreements shall be payable by the appellant to the Corporation. Disputes arose as regards the track rent payable by the appellant to the Corporation and the dispute was referred to arbitration in accordance with the terms of the arbitration clause. Though the parties appointed arbitrators in terms of the arbitration clause of the agreements, the appellant nominated its arbitrator without prejudice to its rights and filed on 7th January, 1963, an appli-

cation in the Original Side of the Calcutta High Court, *inter alia*, for the determination of the question whether there was a valid arbitration agreement between the appellant and the respondent and for other incidental reliefs. The application was heard by A. N. Ray, J., who held that there was an agreement between the appellant and the respondent and that the appellant was a party to the arbitration clauses contained in the relevant agreements; that the respondent could make a reference to arbitration in terms of the said agreements and that the reference to the arbitrators was valid, legal and effective. The appellant, by the Special Leave has filed the present appeal against the said order of the High Court.

Mr. A. V. Viswanatha Sastri, learned Counsel for the appellant, contended that all the rights of the Corporation of Calcutta under the various agreements stood transferred under the Tramways Act, 1951, and vested in the Government of West Bengal except only in regard to the sums payable to the Corporation and that therefore, the Corporation could not rely on the arbitration clauses of the agreements and refer the disputes arising in respect of the sums payable in terms of the said agreements to arbitration.

The point raised is in a small compass and turns upon the relevant provisions of the West Bengal Act XXV of 1951 hereinafter called "the Act." Under the Act the agreement entered into on 30th August, 1951, between the Governor of West Bengal on the one part and the Calcutta Tramways Co., Ltd. on the other part was confirmed. Section 3 of the Act says:

"The transfer agreement is hereby confirmed and made binding on the parties thereto and the several provisions thereof shall have effect as if the same had been enacted in this Act.

"Section 4 enacts that notwithstanding anything to the contrary in any other law, all the powers and duties of the Corporation of Calcutta, the Commissioners of the Howrah Municipality, the Commissioners of the South Suburban Municipality and the Commissioners for the New Howrah Bridge with respect to the construction, maintenance, use, leasing of or otherwise dealing with tramways are transferred to and vested in the Government".

Section 5, which is the crucial section reads :

"(1) The several agreements particulars, whereof are set out in the Second Schedule to this Act shall have effect as if the Government were parties thereto in lieu of the respective bodies and persons set out in column 2 of the said Schedule and any reference in any such agreement to any of such bodies or persons shall unless the subject-matter or the context otherwise requires be deemed to be a reference to the Government :

Provided that any sums payable under any such agreement to any of such bodies or persons shall continue to be payable as if this Act had not been passed."

The Second Schedule contains a list of the titles of the various agreements mentioned by us earlier. Under section 5 of the Act the Government is statutorily substituted for the respondent or its predecessor-in-interest in the various agreements stated supra. The fiction is a well defined one. The Government replaces the Corporation and its predecessors-in-interest as a party to the agreements unless the subject-matter or the context otherwise requires. The natural presumption is that but for the proviso the enacting part of the section would have included the subject-matter of the proviso also. The proviso to section 5 saves from the operation of the substantive section the sums payable under any such agreements to any such bodies mentioned therein : it excludes the operation of the fiction in respect of such sums payable. In respect of the said sums payable the agreements entered into with the said bodies will remain intact as if the Act had not been passed ; that is to say, the respondent would still continue to be a party to the said agreements for the said purpose. The relevant agreements provided for the recovery of the rents and also for the procedure for the recovery of the sums so payable in accordance with the terms of the arbitration clauses of the agreements. Had not the Act been passed and had the Government not been substituted in the place of the Corporation, it cannot be denied that the Corporation, if a dispute arose in regard to the rent, could have referred the dispute to arbitration. The substantive right to the payment of rent and the procedural one to have any dispute arising in respect of that right referred to arbitration embodied in the agreements are interconnected and are not severable.

To preserve the substantive right and to withhold the procedural right to enforce it is to save the right and to deny the remedy. To accept the contention of the appellant is to make out a new agreement between the parties in respect of the sums payable. The acceptance of this suggestion compels the Corporation to give up its agreed remedy. The alternative suggestion, namely, that in respect of the amounts payable to the Corporation the arbitration clauses of the agreements could be enforced by the Government against the appellant introduces an incongruity. While the dispute would be between the appellant and the Corporation, the arbitration would be between the appellant and a third party. The argument that the Government would be acting as a trustee of the Corporation in respect of the sums payable to the Corporation is not supported by any of the provisions of the Act. A fair construction of the proviso to section 5 of the Act removes all the anomalies. Further, in the substantive part of section 5 of the Act the fiction takes effect unless the subject-matter or the context otherwise requires. The proviso in terms as well as by necessary implication brings the subject-matter of the sums payable under the agreements both under the substantive and procedural aspects within the scope of the said exception. The fiction in section 5 of the Act shall yield, to that extent, to the terms of the contract. On such a construction we hold, as we have indicated earlier, that both the right to the said sums payable and the procedure of arbitration are saved thereunder.

In the result, we agree with the view expressed by the High Court and dismiss the appeal with costs.

V.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, RAGHUBAR DAYAL, AND V. RAMASWAMI, JJ.

Badriprasad

.. *Appellant**

v.

The State of Madhya Pradesh and Anr.

.. *Respondents.*

Sale of Goods Act (III of 1930), sections 20 and 25 (1)—Forest Contract Rules, Rules 8 and 18—Felled trees in forest sold by Government by auction—Part of price paid on date of auction, the rest to be paid in instalments—After the acceptance of the bid of purchaser by Divisional Forest Officer, deed of contract signed by both—Later auctioned trees destroyed by fire in forest—Thereafter contract countersigned by Chief Conservator of Forests as required by rules—Property in auctioned trees if passed to buyer before the out-break of fire—Purchaser or on his default his surety if liable to pay the unpaid portion of the purchase price.

Contract Act (IX of 1872), section 196—Sale of cut-trees in forest on behalf of Government—Ratification after goods were destroyed by fire—Validity.

On 24th December, 1956 respondent No. 2 purchased at the public auction sale held by the Divisional Forest Officer the cut timber and the cut arkat trees of a certain coupe in the Harda Forest Division for Rs. 70,200. The appellant stood surety for the purchaser. The purchase price was to be paid in four instalments, the first of which was paid on the date of auction and the other three were to be paid on March, May and December, 1957 respectively. The Divisional Forest Officer and respondent No. 2 signed the deed of contract on 24th, December 1956 and it was countersigned by the Chief Conservator of Forests on 3rd May, 1957. The preamble of the deed of contract mentioned 3rd May, 1957 as the date of making of the contract. The Forest Contract Rules were deemed to be part of the contract entered into between the parties. The entire coupe whose cut timber and arkat trees were sold, was divided into four sections A, B, C and D. This was done in accordance with rule 18 of the Forest Contract Rules. Respondent No. 2 began his carting operations in section A in February 1957. He defaulted in the payment of the second instalment which was due in March, 1957 and he was informed in April, 1957 that no further removal of the cut trees would be allowed in view of the default. A few days later fire broke out in the forest as a result of which the goods purchased

* C.A. No. 672 of 1964.

by respondent No. 2 and not removed by then ceased to exist and he did not pay the amounts due on the 2nd, 3rd and 4th instalments. Respondent No. 1, the State Government, took proceedings against the appellant for recovery of the amount. The appellant sought to avoid his liability as surety for the non-payment of the amount on the ground that the property in the cut trees sold and existing in sections B, C and D had not passed to the contractor before the out break of fire and this was based on the facts that the goods sold were not specific goods as they had not been hammer-marked, that the goods in sections B, C, and D, could not be delivered until the 2nd, 3rd and the 4th instalments had been paid and that the deed of contract was signed after fire had taken place. On the question of the liability of the surety;

Held, the surety cannot avoid his liability to pay the amounts due on the 2nd, 3rd and 4th instalments on any of the grounds urged by him.

The felled trees sold to respondent No. 2 had a butt mark at the butt end. A similar hammer mark existed on the stem near which the felled tree must have lain, it being presumed that the rules for the felling of trees were properly complied with by the forest authorities. The goods sold therefore were specified goods.

There was nothing in the contract that possession would not be delivered over the cut timber in sections B, C and D till the 2nd 3rd and 4th instalments have been paid. The relevant provisions of rule 18 of the Forest Contract Rules do not contain any such restriction. Further in view of rule 1 (a) of the rules relating to contracts for the sale of forest produce, it should be deemed that the payment of the purchase price had been made in full at the time of delivery, though the actual payment was to be made in four instalments.

The fact that the contract was signed by the Chief Conservator of Forests on 3rd May, 1957, had no effect on the question of delivery of possession of the produce sold and consequently on the passing of property in the goods to respondent No. 2. The Chief Conservator who was the proper authority for entering into the contract of sale of property worth over Rs. 70,000 had necessarily to sign the deed of contract subsequent to the actual auction sale and in view of the exigencies of the procedure to be followed may have to sign after a substantial period of time. Practically all the formalities necessary for the execution of the deed except for the signature of the Chief Conservator had been completed before the fire broke out. His formal signature on the deed of contract related back the contract to the date of auction. The sale of the forest produce to respondent No. 2 was therefore finalised on the date of auction subject of course to the acceptance of the bid by the Chief Conservator and the fact that the latter signed the deed on 3rd May, 1957 did not make the sale effective from the date of his signature. His signature did not ratify any action of the Divisional Forest Officer which he took beyond his competence but simply completed the execution of the deed of contract and related back its execution to the date on which the sale took place.

Even assuming that the Divisional Forest Officer was not authorised to enter into the contract, his act having been subsequently ratified by the Chief Conservator, the ratification related back to the date of contract. The provisional acceptance of the bid and the signing of the deed by the Divisional Forest Officer must in the circumstances be held to be subject to ratification. It was within the realm of possibility that the forest produce might be lost on account of fire before the deed of contract was formally signed by the Chief Conservator. The contract entered into therefore involved the possibility of the loss of goods by fire as the basis of the contract. The contention therefore that there could be no ratification of the act of the Divisional Forest Officer after the goods has ceased to exist would be untenable.

It was in accordance with Instruction No. 9 of Volume II of the C.P. and Berar Forest Manual, the 3rd May, 1957, the date on which the Chief Conservator signed the contract, was mentioned in the preamble of the contract deed. That date therefore had not any real effect on the actual date on which the sale took place.

Section 25 (1) of the Sale of Goods Act had no application to the facts of the case. There was nothing in the deed of contract or the Forest Contract Rules which reserved a right of disposal of the goods until the payment of the price. Rule 8 of the Forest Contract Rules which gave a right to stop the removal of forest produce when the value of the produce already removed exceeded the amount of the instalments already paid was made in pursuance of the statutory provisions of section 83 of the Forest Act (XVI of 1927) which creates a lien on forest produce for the money payable to Government. Action which the Divisional Forest Officer can take for stopping the removal of the forest produce sold is therefore in pursuance of the statutory authority conferred and not in pursuance of any terms of

contract. Ordinarily forest produce is to be sold on payment in full at the time of delivery. The provision for allowing payment by instalments is a concession and it is provided in the rules that payment in instalments may however be considered as payment in full provided there be a clause in the agreement in accordance with rule of 8 the Forest Contract Rules. When a contractor is deemed to have paid in full the price, there could be no occasion for the Government to reserve a right of disposal of the property even after its delivery had been made to the purchaser.

The contract was unconditional, the goods sold were specific and were in a deliverable state. Section 20 of the Sale of Goods Act applied to the facts of the case and the property in the goods sold passed to the purchaser at the time the contract was made.

Appeal by Special Leave from the Judgment and Decree dated 26th October, 1962 of the Madhya Pradesh High Court in First Appeal No. 8 of 1960.

C. B. Agarwala and *Dr. W. S. Barlingay*, Senior Advocates, (*A. G. Ratnaparkhi*, Advocate, with them), for Appellant.

M. Adhikari, Advocate-General for the State of Madhya Pradesh and *B. Sen*, Senior Advocate, *M. S. K. Sastri* and *M. N. Shroff*, Advocates and *R. P. Kapur*, Advocate for *I. N. Shroff*, Advocate, with them), for Respondent. No. 1.

The Judgment of the Court was delivered by :

Raghubar Dayal, J. :—This appeal by Special Leave, arises out of a suit instituted by the appellant for a declaration that he was not liable to pay a certain amount originally due from defendant-respondent No. 2 and for the issue of a permanent injunction restraining the State Government, Madhya Pradesh, defendant-respondent No. 1 from continuing the proceedings for the recovery of the amount or for starting any fresh proceedings. The suit was decreed by the trial Court but, on appeal, the High Court reversed the decree and dismissed the appellant's suit.

The admitted facts of the case are that on 24th December, 1956, respondent No. 2 purchased at the public auction sale held by the Divisional Forest Officer, Harda, the cut timber and arkal trees of coupe No. 9 Easterr, East Kalibhit Range, in Harda Forest Division, for Rs. 70,200. The appellant stood surety for the purchaser, viz., respondent No. 2. The purchase price was to be paid in four instalments, according to para. 4 of the deed of contract. Rs. 17,600 were to be paid at once and were so paid. The other instalments were due on 1st March, 15th May and 15th December, 1957. These instalments were not paid by respondent No. 2 and hence respondent No. 1 took proceedings against the appellant for the recovery of the amount.

According to the terms of the contract the contractor, respondent No. 2, was to commence his work of collecting and removing the cut timber within 1 month after furnishing a copy of the boundary certificate. This certificate, Exhibit D-1, was furnished on 5th February, 1957 and stated that the respondent No. 2 had clearly understood the boundaries of the areas covered by the lease and that he had taken possession of the standing/felled/collected material in the aforesaid coupe as announced at the auction and described in the said lease and that he was satisfied that the quantity delivered to him agreed substantially with that announced at the auction.

The appellant Badri Prasad signed this certificate as a witness. The work could continue upto 30th June, 1958.

Interest was to be charged at 6-1/4 per cent. per annum in respect of the instalments not paid on the due dates. The removal of the forest produce purchased from the contract areas was to be according to specified routes and, after they had been examined at the depots specified in clause 5 of the contract deed. Clauses 5-A and 5-B of the contract made it incumbent on the forest contractor respondent No. 2 to set apart certain timber for certain purposes to the agriculturists and the residents of the villages till three months before the expiry of the contract. The Forest Contract Rules were deemed to be part of the contract entered into between respondent No. 2 and the State, by clause 6 of the contract.

The formal deed of contract was signed by the Chief Conservator of Forests on 3rd May, 1957 and the preamble of the deed gives the date of the making of the contract to be 3rd May, 1957.

The First Schedule to the Contract states:

"The forest produce sold and purchased consists of: All standing trees bearing hammer mark of marginally shown device at base and breast height. All felled trees marked at the butt end and stumps with the device shown in the margin."

This is signed by the contractor, respondent No. 2 and by the Divisional Forest Officer, Harda Division, dated 24th December, 1956. The trace of the coupe sold was signed by Respondent No 2 and the Divisional Forest Officer on 29th November, 1956, prior to the actual auction sale. The third Schedule relating to the out-turn register was also signed by respondent No. 2 and by the appellant who stood surety and the Divisional Forest Officer, on 24th December, 1956.

The security bond was signed by the appellant on 29th December, 1956 and by the Divisional Forest Officer on 30th March, 1956 and was counter-signed by the Chief Conservator on 3rd May, 1957.

The entire coupe whose cut timber was sold to the respondent was divided into four sections A, B, C and D. This was done in accordance with rule 18 of the Forest Contract Rules. This rule provides that the operations carried out in the contract area under a forest contract for the sale of standing trees are divided into two stages (a) cutting and (b) carting. Cutting operations include felling and all processes of conversion, etc. without removing it further from the place where it was felled that may be necessary to carry out such processes. Carting operations include all operations for the removal of a felled tree, or its converted products from the place where the tree was felled, whether such removal be to a depot or to a saw mill or other destination. Sub-rule (2) of rule 18 authorizes the Divisional Forest Officer to divide the contract area, shortly termed a coupe, into such number of sections, not exceeding eight, as he may think fit. The Divisional Forest Officer can regulate and confine the operations of the forest contract in accordance with the provisions mentioned in clauses (a) to (c) of that sub-rule. Clause (b) provides that a forest contractor can be allowed to carry out cutting operations first in sections 1 and 2 of the coupe only and as soon as he begins cutting operations in section 3 he shall be deemed to have surrendered all his rights to the standing trees in section 1 and similar would be the result on his beginning cutting operations in section 4 and so on, till all the sections of the coupe are completed. Clause (c) authorises the forest contractor to begin carting operations from the sections whose trees, he has begun to cut and provides that his rights to the forest produce in section 1 cease when he starts cutting operations in section 4, and so on.

The provisions of rule 20 apply to contracts where the trees have been felled by the Forest Department and the felled trees only were sold to the forest contractor. Sub-rule (3) makes rules 18 and 19 applicable to such contracts in so far as they be applicable. Sub-rule (2) of rule 20 provides that a forest contractor who has purchased felled trees shall remove all the trees purchased by him under his contract.

Respondent No. 2, the contractor, began his operations in section A of the coupe in the last week of February, 1957. He defaulted in the payment of the second instalment which was due on 1st March, 1957 and did not pay that amount till 25th April, 1957, though it was demanded several times from him. On 23rd March, 1957, a notice, Exhibit P-4, was issued to him. It stated:

"You are being informed through this notice that the removal of goods from the coupe by you is already in excess of the amount deposited by you in the treasury. So please send the challan of the second instalment as soon as possible by the return load carrier, otherwise your removal of goods would be stopped and a report would be made to the higher authority within two days."

This was duly served on respondent No. 2

On 25th April, 1957, the appellant was told by the forest authorities that no further removal of the forest produce would be allowed in view of the default of payment of the second instalment. The licence book and the transit pass were taken back by the Government Forester, Mandanlal Pagarc.

Fire broke out in the forest and the cut timber sold to respondent No. 2 was burnt. The report about the loss from fire is Exhibit D-2, dated 29th April, 1957 and is signed by the contractor and Sheoprasad Parashar, the Forest Guard. As a result of the fire the goods purchased by respondent No. 2 and not removed by

then, ceased to exist. He did not pay the amounts due for the 2nd, 3rd and 4th instalments.

The appellant sought to avoid his liability as surety for the non-payment of the amount *inter alia* on the ground that the contractor respondent No. 2 had not been put in possession of the cut timber sold to him except of such timber which had been in section A of coupe No. 9, that therefore there had been no transfer of property in the timber sold to him and that he was therefore not liable for paying the amounts due on the 2nd, 3rd and 4th instalments. It was averred by the appellant in paragraph 5 (A) of the plaint :

"Thus it was clearly understood on both sides and also explained by the Forest Department officials of defendant No. 1 and which has been all along implicit in the contract as per usual practice of the Forest Department that the possession of the goods of each respective section will be delivered to the contractor on payment of each instalment as stated above. It was only on due payment of each instalment that the contractor was to become entitled to remove the goods in pursuance of the licence book supplied to him by the Forest Department of Defendant No. 1."

In paragraph 5 (B) it was stated :

"That the contractor or his licensees had no right to remove the goods until the same was duly hammer marked by the representative of the said Forest Department and until the licence and the transit pass were duly checked and signed by the Coupe Guard or such other representative as may be present on the spot."

Paragraph 5 (C) mentioned :

"That the contractor or his men were further liable to carry the forest produce for check and examination of Forest Depot officers of Ziri, Rahetgaon and Timarni established for that purpose and after the cut wood was checked by the Depot Officers, the same used to be marked with a special hammer mark, and unless that was done it was not lawful for any person to remove timber brought to the Depot."

Respondent No. 1 admitted what was stated in paragraphs 5 (B) and (C) of the plaint. It denied the understanding as averred in paragraph 5 (A) and what was alleged in paragraph 5 (D) to the effect that it was after the processes mentioned earlier that delivery of the goods was deemed to be given to the forest contractor and was to be at his disposal.

The main question urged before us is that the property in the cut timber sold and existing in sections B, C and D of the coupe had not passed to the contractor before the fire broke out in the last week of April, 1957 and this contention is based on the facts that the goods sold were not specific goods as they had not been hammer-marked, that the goods in sections B, C and D could not be delivered till the 2nd, 3rd and 4th instalments had been paid and that the deed of contract was signed after the fire had taken place.

We may now consider the points urged in support of the contention that the property in the timber of sections B, C and D had not passed to respondent No. 2.

The first schedule to the contract described the property, forest produce sold and purchased, thus :

"All standing trees bearing hammer mark of marginally shown device at base and breast height. All felled trees marked at the butt end and stumps with the device shown in the margin."

It is the case of the plaintiff-appellant that cut tree timber or cut trees were sold. Paragraph 2 (A) of the plaint describes the property purchased as "the cut timber and arkat trees of coupe No. 9". Clause (1) of paragraph 2 of the Statement of The Case filed on behalf of the appellant makes this further clear as it is stated therein that the contract was for the purchase of "the cut timber and cut arkat trees". It appears therefore that the expression about "all standing trees bearing hammer mark" in the description of forest produce sold was inadvertently omitted to be struck out from the deed of contract though there was no sale of standing trees to respondent No. 2.

Chapter XX of Part IV of Volume I of the Central Provinces and Berar Forest Manual (hereinafter shortly termed Forest Manual) gives the rules for the disposal of forest produce. Rule 5 states that before forest produce is disposed of it shall be properly marked. The standing trees are marked with hammer at two places,

at the butt end and at the lower part, a little above the stem. The trees are to be felled so as to leave the lower hammer mark in the un-cut portion. The felled tree sold is subject to further processes of cutting, etc. The portions so cut have to be hammer marked, as only one such portion will have the hammer mark which was first put at the butt end of the tree. A second special hammer mark is placed on these cut portions at the time of checking at the Depot. The two hammer marks necessary to be put on the cut portions of the felled tree before they could be actually taken away from the forest area were not made on the cut timber existing in sections B, C and D and sold to respondent No. 2, as the felled trees in those areas had not been cut further by the contractor. The omission to put such marks does not make the goods sold unascertained. The felled trees sold to the respondent No. 2 had a butt mark at the butt end. A similar hammer mark existed on the stem near which the felled tree must have lain, it being presumed that the rules for the felling of trees were properly complied with by the Forest authorities, mentioned above. The goods sold therefore were specified goods.

There is nothing in the contract that possession would not be delivered over the cut timber in sections B, C and D till the 2nd, 3rd and 4th instalments have been paid. The relevant provisions of rule 18 of the Forest Contract Rules, extracted earlier, do not contain any such restriction. It only provides that the operations necessary to be conducted by the contractor had to start with section A or the first section and that the rights of the contractor to the material purchased would be deemed to be surrendered in certain circumstances. This has nothing to do with the payment of the instalments by the contractor. He can proceed to operate on the entire property purchased, according to his inclination in accordance with the procedure, as regulated by the rules. There is therefore no force in the submission that there could have been no delivery of possession over the procedure sold and existing in sections B, C and D till the various instalments had been paid.

The fact that the contract was signed by the Chief Conservator of Forests on 3rd May, 1957, after fire had broken out has no effect on the question of delivery of possession of the produce sold and consequently on the passing of property in the goods to the contractor respondent No. 2. The Chief Conservator who was the proper authority for entering into the contract of sale of property worth over Rs. 70,000 had necessarily to sign the deed of contract subsequent to the actual auction sale and in view of the exigencies of the procedure to be followed may have to sign after a substantial period of time.

The bid of respondent No. 2 at the auction sale had been provisionally accepted by the Divisional Forest Officer who is authorized under the rules to conduct the auction sale. The Divisional Forest Officer and respondent No. 2 thereafter signed the deed of contract on 24th December, 1956 the date on which the auction sale took place. The appellant, as surety, also signed the third schedule on 24th December and the security bond on 24th December. Practically all the formalities necessary for the execution of the deed except for the signatures of the Chief Conservator, authorized to enter into a contract of this magnitude, had been completed. His formal signature on the deed of contract relates back the contract to the date of auction when the bid of respondent No. 2 was provisionally accepted and he and the Divisional Forest Officer signed the contract.

In this connection reference may be made to certain rules and the instructions issued by Government to the various officers for complying with those rules. Executive instructions on the preparation of forest contract agreements are printed at page 125 of Volume II of the Forest Manual. Instruction No. 9 provides that if the parties have signed the deed on the same date, that date should be entered in the preamble, but if they had signed on two different dates, then the later of those two dates should be entered in the preamble. It was in accordance with this instruction that 3rd May, 1957, the date on which the Chief Conservator signed the contract was mentioned in the preamble of the contract deed. That date therefore had not any real effect on the actual date on which the sale of the forest produce took place in favour of respondent No. 2.

Instruction 10 directs that the dates in clause 2 of the prescribed deed of contract should be very carefully entered as they have an important bearing on the deed and show the period during which the contract will remain in force. Such a period in the deed of contract Exhibit D is the period "from the date the forest contractor furnishes the necessary coupe boundary certificate after inspection of the contract area to the 30th day of June, 1958, both days inclusive". The coupe boundary certificate was furnished on 5th February, 1957. It follows that the period for the operation of the contract was from 5th February, 1957 to 30th June, 1958. This is a clear indication that the date in the preamble has no real effect and that the contract, after its being duly signed by the competent authority, relates back to the date of sale.

Instruction 16 deals with the execution of the deed of contract. Clause (i) provides for the drawing up of the contract in triplicate. Clause (ii)..... Clause (iii) requires the Divisional Forest Officer to initial the contract after checking it before the lessee is asked to sign it. Clause (iv) provides that where the Divisional Forest Officer himself is empowered to execute the agreement he and the lessee should execute it together and clause (v) provides that where the Divisional Forest Officer is not empowered to execute the agreement, it should be executed by the lessee and his signature should be attested and that the agreement should then be sent as soon as possible to the Forest Officer empowered to execute it, for his signature and attestation.

These instructions about the execution of the deed of contract plainly take into consideration the lapse of time between the execution by the lessee and by the competent Forest authority.

Instructions Nos. 38 to 48 are with regard to the auction of forest contracts. It is the Divisional Forest Officer who is directed to take certain steps. Instruction No. 45 provides that Divisional Forest Officers should ordinarily allow themselves more than one day for the conduct of the auction sales. Instruction No. 47 provides that where the agreements are to be signed by the Conservator or higher authority, the first instalment must still be paid and the duplicate agreements signed by the contractor and his surety, if any, and sent to the Conservator immediately. The Conservators should sign the duplicate agreements in token of acceptance and return them to the Divisional Forest Officers as soon as possible. The reason for this is that it is obviously only fair to a forest contractor that he should be in possession of his signed agreement before he starts work on his contract, *i.e.*, before 1st July. In case the Conservators are not competent to sign the contract deeds such deeds will have to be sent by them to the Chief Conservator who is competent in view of rule 102-A of Vol. I of the Forest Manual (under Chapter XIX) and the relevant orders of the Government to execute contracts for the sale of forest produce up to an amount of Rs. 1,00,000 when payment is received in full at the time of delivery and upto Rs. 10,000 or upto Rs. 50,000 with the previous sanction of the Provincial Government when payment is not received in full at the time of delivery.

The exercise of this power by the Chief Conservator and other officers is subject to the rules given in the Government Notification and rule 1 (a) of these rules relating to contracts for forest produce reads :

"No timber or other forest produce may be ordinarily sold except on cash payment in full at the time of delivery. Payment in instalments may, however, be considered as payment in full at the time of delivery provided that there is a clause in the agreement to the effect that when the Divisional Forest Officer considers that the value of any forest produce removed by the purchaser equals or exceeds the amount of purchase-money paid by him up to that time, the Divisional Forest Officer may stop further removal until the purchaser has paid such further sum, as in the opinion of the Forest Officer, may be sufficient to cover the excess value of the forest produce removed or about to be removed."

In view of this rule it would be deemed that the payment of the purchase price had been made in full at the time of delivery, though the actual payment was to be made in four instalments.

We are therefore of opinion that the sale of the forest produce to respondent No. 2 was finalised on the date of sale subject of course to the acceptance of his bid by the competent authority, the Chief Conservator of Forests and that the fact that the Chief Conservator signed the deed on 3rd May, 1957, does not make the sale effective from the date of his signature. His signatures do not ratify any action of the Divisional Forest Officer which he took beyond his competence, but simply complete the execution of the deed of contract and relate back its execution to the date on which the sale took place and the contractor and the Forest Officer had signed the document.

We may now refer to the approach of the High Court to this question of the deed of contract operating from the date of its execution by respondent No. 2. It was of opinion that respondent No. 2, and the Divisional Forest Officer, had made the contract in December, 1956 long before 28th April, 1957 and even if the Divisional Forest Officer was not competent to enter into the contract, his act had been subsequently ratified by the competent authority and that therefore the ratification related back to the date of the contract and has the same effect as if the Divisional Forest Officer had performed the act by the authority of the Chief Conservator of Forests. With respect, we do not consider this approach to be correct. The Divisional Forest Officer had authority under the statutory rules for holding the auction and for provisionally accepting the bid. All what he did was within his authority. He did not actually enter into the contract with respondent No. 2. He simply signed the standard form of the contract for the satisfaction of the competent authority to the effect that its accepting the bid and entering into the contract would be correct as is the usual official procedure where subordinates have to put up or forward papers to the superior officers for approval, sanction or orders. The right view of the entire procedure adopted in the case has been already stated by us above.

The other point urged by Mr. Agarwala, for the appellant, is that in view of rule 8 of the Forest Contract Rules which empowered the Divisional Forest Officer to stop the removal of forest produce sold on his finding that the value of the forest produce already removed by the contractor exceeded the amount of the instalments already paid by him, the seller in this case had reserved the right of disposal of the forest produce until certain conditions were fulfilled and that therefore section 25 (1) of the Indian Sale of Goods Act, 1930 (III of 1930) applies to the facts of the case and that therefore, notwithstanding delivery of the forest produce to respondent No. 2 in February, 1957, the property in it did not pass to respondent No. 2 until the conditions imposed by the seller were fulfilled. There is nothing in the deed of contract or in the Forest Contract Rules which reserved such a right of disposal in the State. Right given to the Government under rule 8 is the right to stop the removal of forest produce when the value of the forest produce already removed exceeded the amount of the instalments paid. This is to regulate the compliance with the conditions of the auction one of which was that ordinary forest produce was to be sold on payment in full at the time of delivery. The contractor had therefore to pay full price he had bid at the date of the sale or any day prior to the delivery of the goods to him in February, 1957. The provisions for allowing payment by instalments is a concession for the convenience of the contractor and it is provided in the rules that payment in instalments may however be considered as payment in full at the time of delivery provided there be a clause in the agreement in accordance with the provisions of rule 8 of the Forest Contract Rules.

Reference may here be made to the provisions of section 83 of the Indian Forest Act, 1927 (XVI of 1927). Sub-section (1) provides that when any money is payable for or in respect of any forest produce, the amount thereof shall be deemed to be a first charge on such produce, and such produce may be taken possession of by a Forest Officer until such amount has been paid. Rule 8 of the Forest Contract Rules is therefore in pursuance of the statutory provisions of section 83 of the Forest Act which creates a lien on forest produce for the money payable to Government. Action which the Divisional Forest Officer can take for stopping the removal of

the forest produce sold is in pursuance of the statutory authority conferred on him and not in pursuance of any terms of the contract between respondent No. 2 and the Government.

When a contractor is deemed to have paid in full the price there could be no occasion for the Government to reserve a right of disposal of the property even when its delivery had been made to the purchaser. As already stated, it is section 20 of the Sale of Goods Act which will apply to this case. This section provides that where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment of price or the time of delivery of the goods or both is postponed. The contract was unconditional, the goods sold were specific. They were in a deliverable state and therefore the property in the goods did pass at the time when the contract was made. This section would have applied even if the time of payment of price had been postponed. In the present case, as already stated, the payment allowed by instalments is to be deemed payment in full at the time of the delivery of the goods sold.

The last contention raised for the appellant is that as the contract was signed by the Chief Conservator about a week after the goods, lying in sections B, C and D had been burnt by fire, the contract must be deemed to have been not made at all by the Chief Conservator who could not have contracted to sell goods which did not exist. The contention really is that there could be no ratification of the act of the Divisional Forest Officer, who had no authority to enter into the contract after the goods had ceased to exist and reliance is placed in support of this contention on what is stated at paragraph 415 at page 177 of Halsbury's Laws of England, Vol. I., III Edition. It is stated there:

"As to the time within which ratification may take place, the rule is that it must be either within a period fixed by the nature of the particular case, or within a reasonable time, after which an act cannot be ratified to the prejudice of a third person."

This is the general proposition and will not be applicable to this case as no third person is being prejudiced on account of the signing of the contract by the Chief Conservator on 3rd May, 1957, a week after the fire had destroyed certain goods purchased. Further, it is stated in the same paragraph:

"But by an anomalous rule limited to marine insurance a contract of marine insurance made by an agent on the principal's property may be ratified by the principal after notice of loss."

This proposition is well-settled in England. In *Williams v. North China Insurance Co.*¹, this proposition was sought to be reviewed. Cockburn, C.J., said at page 764:

"The existing authorities certainly shew that when an insurance is effected without authority by one person on another's behalf, the principal may ratify the insurance even after the loss is known. Mr. Benjamin asked us, as a Court of Appeal, to review those authorities Where an agent effects an insurance subject to ratification, the loss insured against is very likely to happen before ratification, and it must be taken that the insurance so effected involves that possibility as the basis of the contract. It seems to me that, both according to authority and the principles of justice, a ratification may be made in such a case."

These observations would fully apply to the facts of the present case, even if we were of the view that the Chief Conservator ratified the unauthorised act of the Divisional Forest Officer on 3rd May, 1957, after the fire had taken place. The provisional acceptance of the bid and the signing of the deed by the Divisional Forest Officer must, in the circumstances, be held to be subject to ratification. It was within the realm of possibility that the forest produce might be lost on account of fire or any other risk mentioned in rule 32 of the Forest Contract Rules before the deed of contract was formally signed by the Chief Conservator. The contract entered into therefore involved the possibility of the loss of goods by fire as the basis of the contract.

Lastly, reference may be made to rule 32 of the Forest Contract Rules which provides that a forest contractor shall not be entitled to any compensation what-

ever for any loss that may be sustained by reason of fire, etc. This is not a suit for compensation by the contractor respondent No. 2 but in essence the basis of the suit is that the forest contractor did not get possession of the forest produce in sections B, C and D, that such produce was lost by fire and that therefore he has not to pay the second, third and fourth instalments and cannot be said to be in default in payment of those instalments. The loss of such goods by reason of fire therefore does not in any way give support to the claim of the appellant.

We are therefore of opinion that the appellant's suit has been rightly dismissed by the High Court. We accordingly dismiss the appeal. There will be no order as to costs.

V.K.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT:—J.C. SHAH, V. RAMASWAMI AND V. BHARGAVA, JJ.

S. S. Rajalinga Raja

.. Appellant*

v.

The State of Madras

.. Respondent.

Madras Plantations Agricultural Income-tax Act, (V of 1955), sections 3, 4, 65—scope—Agricultural income-tax—Sale of produce of earlier years in the year of account—Income derived, whether exempt—Tax for those years paid after composition—Produce of those years, whether had suffered tax.

For the assessment year 1957-58, the appellant submitted a return disclosing a net agricultural income of Rs. 5,250 from his cardamom plantation. On enquiry the Agricultural Income-tax Officer learnt that the appellant had sold stocks of cardamom of the value of Rs. 58,375-9-9 between 1st April, 1956 and 31st March, 1957. The appellant explained that those sales represented not the produce of the year of account but accumulated stocks of the past three to four years. That explanation was rejected by the Agricultural Income-tax Officer and after allowing expenditure estimated at the rate of Rs. 120 per acre the balance was brought to tax and a penalty of Rs. 3,000 was levied. The order was confirmed by the Appellate Assistant Commissioner. But the Tribunal was of the view that the average production of cardamom per acre was 40 lbs., and that if the stock of cardamom sold in the year of assessment be attributed to production of the year, the yield would approximately be 134 lbs. per acre. Holding that an estimate of 40 lbs. per acre would be a "fair estimate" and that an average expenditure of Rs. 145 per acre should be allowed, the Tribunal directed that the assessment be modified and the order imposing penalty be set aside. The High Court, on revision, rejected the contention of the appellant that the income from sales of cardamom stock of previous years was not taxable in the year of account because it had been subjected to tax in those previous years under orders compounding the tax under section 65 of the Madras Plantations Agricultural Income-tax Act, 1955 and restored the assessment made by the Agricultural Income-tax Officer. On appeal to Supreme Court,

Held, that merely because the produce of the plantation was received in the earlier years, assuming that the appellant's case was true, income derived from sale of that produce in the year of account was not exempt from tax under the Act, in that year.

From the mere fact that the appellant did not submit returns of income for the years 1955-1956 and 1956-1957 but applied to compound the tax under section 65 of the Act, and paid the tax determined at the rates specified in Part II of the Schedule to the Act, it could not be inferred that the produce which was sold by him in the year of account had suffered tax in the earlier years.

It is not necessary for income to accrue that there must be a sale of a commodity; consumption by use of a commodity in the business of the assessee from which the assessee obtains benefit of the commodity may be deemed to give rise to income.

Section 3 of the Act read with the definition of "agricultural income" charges to tax the monetary return either as rent or revenue or agricultural produce from the plantation. The expression "income" in its normal connotation does not mean mere production or receipt of a commodity which may be converted into money. Income arises when the commodity is disposed of by sale

consumption or use in the manufacture or other processes carried on by the assessee *qua* that commodity. There is no reason to think that the expression "income" in the Act has any other connotation. A tax on income whether agricultural or non-agricultural, is, unless the Act provides otherwise, a tax on monetary return, actual or notional. Section 4 of the Act supports that view, for in the total agricultural income is comprised all agricultural income derived from a plantation in the State.

Appeals by Special Leave from the Judgments and Orders dated the 12th November, 1962, and 1st January, 1964, of the Madras High Court in Tax Case No. 19 of 1961 and S.C. Petition No. 142 of 1963 respectively.

S. Swaminathan and *R. Gopalakrishnan*, Advocates, for Appellant.

P. Ram Reddy, Senior Advocate (*A. V. Rangam*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Shah, J.—*S. S. Rajalinga Raja*—hereinafter called "the appellant"—owns a cardamom plantation on a fifty-acre estate. For the assessment year 1957-58 he submitted a return under the Madras Plantations Agricultural Income-tax Act V of 1955 disclosing a net income of Rs. 5,250 from the plantation. On enquiry the Agricultural Income-tax Officer learnt that the appellant had sold stocks of cardamom of the value of Rs. 58,375-9-9 between 1st April, 1956 and 31st March, 1957. The appellant explained that those sales represented not the produce of the year of account, but accumulated stocks of the past 3 to 4 years. That explanation was rejected by the Agricultural Income-tax Officer and after allowing expenditure estimated at the rate of Rs. 120 per acre, the balance was brought to tax, and a penalty of Rs. 3,000 was levied under section 20 (1) (c) of the Act. The order was confirmed in appeal to the Appellate Assistant Commissioner, both as to the levy of tax and penalty. But the Appellate Tribunal was of the view that the average production of cardamom per acre was 40 lbs. and that if the stocks of cardamom sold in the year of assessment be attributed to production of the year, the yield would approximately be 134 lbs. per acre. Holding that an estimate of 40 lbs. per acre would a "fair estimate" and that an average expenditure of Rs. 145 per acre should be allowed, the Tribunal directed that the assessment be modified, and the order imposing penalty be set aside.

The State of Madras then applied to the High Court of Madras in revision. The High Court was of the view that a part of the stock of cardamom sold in the year, though not the whole, was probably accumulated stock out of previous year's production, but since the appellant did not lay before the taxing authorities reliable evidence, his explanation was rightly rejected. The High Court also rejected the contention of the appellant that the income from sales of cardamom stock of previous years was not taxable in the year of account because it had been subjected to tax in those previous years under orders compounding the tax under section 65 of the Act. The High Court accordingly allowed the petition and restored the assessment made by the Department. With Special Leave, the appellant has appealed to this Court.

It is claimed by the appellant in the first instance that under the Act, agricultural produce itself is income and becomes charged to tax under the Madras Plantations Agricultural Income-tax Act, 1955, when it is received, and not when it is sold, used or consumed. Relying upon this premise it was urged that even on the view expressed by them the learned Judges of the High Court ought to have directed determination of the produce which was actually derived from agriculture in the year of account, and ought to have brought to tax only that quantity and excluded the value of the rest from taxation under the Act. Section 3 of the Act imposes the charge of tax upon the total agricultural income of the previous year of every person, and by section 4 the total agricultural income of any previous year of any person comprises all agricultural income derived from a plantation within the State, and received within or without the State. "Agricultural income" is defined (in so far as the definition is relevant in these appeals) as meaning :

"(1) any rent or revenue derived from a plantation :—

(2) any income derived from such plantation in the State by—

(i) agriculture ; or

(ii) the performance by a cultivator or receiver of rent-in-kind of any process ordinarily employed by a cultivator or receiver of rent-in-kind to render the produce raised or received by him fit to be taken to market ; or

(iii) the sale by a cultivator or receiver of rent-in-kind of the produce raised or received by him, in respect of which no process has been performed other than a process of the nature described in paragraph (ii) :

Explanation 1 —

Explanation 2.—

(3)

Prima facie, section 3 of the Act read with the definition of "agricultural income" charges to tax the monetary return either as rent or revenue or agricultural produce from the plantation. The expression "income" in its normal connotation does not mean mere production or receipt of a commodity which may be converted into money. Income arises when the commodity is disposed of by sale, consumption or use in the manufacture or other processes carried on by the assessee *qua* that commodity. There is no reason to think that the expression "income" in the Act has any other connotation. A tax on income whether agricultural or non-agricultural is, unless the Act provides otherwise, a tax on monetary return—actual or notional. Section 4 of the Act supports that view, for in the total agricultural income is comprised all agricultural income *derived* from a plantation in the State. It is not necessary, however, for income to accrue that there must be a sale of a commodity; consumption or use of a commodity in the business of the assessee from which the assessee obtain benefit of the commodity may be deemed to give rise to income. Therefore, merely because the produce of his plantation was received in the earlier years, assuming that the appellant's case is true, income derived from sale of that produce in the year of account is not exempt from tax under the Act, in that year.

¶ Counsel for the appellant strongly relied upon a judgment of this Court in *Dooars Tea Co., Ltd. v. Commissioner of Agricultural Income-tax, West Bengal*,¹ a case decided under the Bengal Agricultural Income-tax Act IV of 1944. It was held in interpreting the definition of section 2 (1) (b) of the Bengal Agricultural Income-tax Act, 1944, which is in substantially the same language as the definition under the Act, that it was not predicated of the agricultural income that it must be sold and profit or gain received from such sale before it can be included in the definition of agricultural income. In *Dooars Tea Co. Ltd.'s case*¹, the appellant grew bamboos, thatching grass and fuel by agricultural operations and utilized the products for the purpose of its tea business. The claim of the Income-tax Authorities to tax the value of the produce was resisted on the plea that the produce was not sold. In rejecting that plea, the Court observed at page 13 :

"In terms the clause (section 2 (1) (b)) takes in income derived from agricultural land by agriculture; and as we have already pointed out giving the material words their plain grammatical meaning there is no doubt that agricultural produce constitutes income under this clause. Is there anything in the context which requires the introduction of the concept of sale in interpreting this clause as suggested by the appellant? In our opinion this question must be answered in the negative. Not only is there no indication in the context which would justify the importing of the concept of sale in all to the contrary. What this clause seems clearly to have in view is agricultural produce itself which has been used by the assessee."

But these observations do not, in our judgment, imply that agricultural produce when received by a person carrying on agricultural operations becomes income in his hands. The Court in that case was concerned to deal with a limited question whether a person who has raised agricultural produce instead of selling it uses that produce for his own business, can be said to have earned agricultural income? The Court in that case held that he would be deemed to be earning income. The decision

1. (1962) 2 S.C.J. 52; (1962) 3 S.C.R. 157; (1962) 44 I.T.R. 6 (13) : A.I.R. 1962 S.C. 186.

is authority for the proposition that for agricultural income to arise, it is not predicated that the agricultural produce must be sold : user of agricultural produce for the purpose of the business of the assessee may give rise to agricultural income.

The decision in *State of Kerala and another v. Bhavani Tea Produce Co., Ltd.*¹ on which reliance was placed by Counsel for the appellant has, in our judgment, no relevance whatever in this case. In *Bhavani Tea Produce Company's case*¹, the assessee was required under section 25 of the Coffee Act, 1942, to deliver the coffee produced by it to the Coffee Board and the question which fell to be determined was whether such delivery constituted sale by operation of law as a result of which the assessee ceased to be the owner of the coffee, the moment it handed over the produce to the Coffee Board. This Court held that under the relevant provisions of the Act as soon as the producer of coffee handed over the produce to the Coffee Board, it ceased to be the owner and income accrued to him at that point of time. That case does not lay down the proposition that income accrues to a producer of agricultural produce before the date of disposal, use or sale.

The second argument raised by the appellant has also no substance. For the years 1955-56 and 1956-57 the appellant did not submit returns of income, but applied to compound the tax under section 65 of the Act, and paid the tax determined at the rates specified in Part II of the Schedule to the Act. Therefrom it cannot be inferred that the produce which was sold by him in the year of account to which these appeals relate had suffered tax in the earlier years. It has to be proved that the crop sold by the appellant related to the years in respect of which he had applied to compound the tax ; and on that part of the case there is no evidence.

The appeals therefore fail and are dismissed with costs. There will be one hearing fee.

T.K.K.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—J. C. SHAH, V. RAMASWAMI AND V. BHARGAVA, JJ.

Joint Family of Udayan Chinubhai, etc.

.. *Appellants**.

v.

Commissioner of Income-tax, Gujarat

.. *Respondent*.

Income-tax Act (XI of 1922), sections 25-A, 34—Re-assessment—Partition of Hindu undivided family—Order recognising partition—Re-assessment proceedings ignoring such order—Validity—Nature of order recording partition.

Hindu undivided family—Partition between groups of members of family—Whether can be recognised by Income-tax Officer—Partition between C and his wife and sons—Wife and sons forming one group—Share allotted to wife and sons remaining undivided—Order recording partition—Wife and sons whether constitute Hindu undivided family and assessable in that status.

C, his wife T and his three sons, U, K and A were originally assessed to income-tax in the status of a Hindu undivided family by the First Income-tax Officer, A-III Ward, Bombay. C filed a suit in the High Court of Bombay for partition and separate possession of his share in the joint family estate. On 8th March, 1950, the High Court passed a decree by consent declaring that as from 15th October, 1947, the joint family stood dissolved and that all the members of the family had become separate in food, worship and estate from that date and that each member of the family was entitled to a fifth share in the properties movable and immovable belonging to the family subject to the right of maintenance in favour of the mother of C. In Schedule A Part I properties which were allotted to C were set out. In Parts II and III of Schedule A properties which were collectively allotted to the shares of U, K, A and T were set out. It was declared by the decree that the properties movable and immovable "described in Parts II and III of Schedule A shall absolutely belong to and vest in

1. (1966) 1 I.T.J. 85 : (1966) 1 S.C.J. 122.

* C. As. Nos. 946 to 948 of 1965.

14th October, 1966.

the four defendants" (the three sons and T) "in equal shares in full satisfaction of their respective rights in the joint family properties subject, as regards the properties described in Part II of Schedule A to the provisions of the Baronetcy Act." Pursuant to the decree C took his share in the properties allotted to him separately. The other properties remained undivided between U, K, A and T, each holding a fourth share as tenants-in-common with the other co-sharers. On 3rd December, 1952, C applied to the Income-tax Officer, A-III Ward, Bombay, for an order under section 25-A of the Indian Income-tax Act, 1922, recording the partition and for separate assessments. The Income-tax Officer by order dated 6th January, 1953, granted the application recording that "from 8th March, 1950, the Hindu undivided family is deemed to have been partitioned and assessments subsequent to that date will be made on the two groups separately." The Income-tax Officer, Ahmedabad, thereafter assessed T and the sons of C separately. After some time the Income-tax Officer, Ahmedabad, initiated proceedings under section 34 for the assessment years 1951-52, 1952-53, and 1953-54 for assessing the Hindu undivided family of the four members U, K, A and T on the ground that income of the family had escaped assessment and assessed them in the status of a Hindu undivided family. In appeal to the Appellate Assistant Commissioner the order of assessment under section 34 was set aside. The Tribunal, on further appeal, restored the order passed by the Income-tax Officer. The High Court, on reference, confirmed the assessment. On appeal to Supreme Court,

Held, that the assessments made on the assessee as on a Hindu undivided family consisting of the three sons of C and his wife T were not correct.

Section 34 of the Act confers no general power of reviewing an order passed under section 25-A (1) which is in its very nature effective for all subsequent years.

The jurisdiction under section 25-A (1) can be exercised by the Income-tax Officer even if there be partition between groups of members of a Hindu undivided family. A complete partition in definite portions among all the members of the family is not a condition of the exercise of that jurisdiction. The expression "group of members" is not intended to refer to a group consisting of a head of a branch and his sons who remain undivided.

After the order under section 25-A (1) was recorded the original Hindu undivided family had no existence in fact or in point of law—personal or income-tax.

Once an order under section 25-A (1) has been recorded, clause (3) of section 25-A has no application. If the members of the family who constituted a group between whom and the other groups there has been a partition in definite portions constitute a Hindu undivided family, that group may undoubtedly be assessed as a Hindu undivided family; they may be so assessed because of their relation *inter se*, and not by virtue of section 25-A (3).

Held on facts : T, U, K and A, constituted a group and between them and C there had been partition in definite portions.

The order passed by the Income-tax Officer, Bombay, under section 25-A (1) was a valid order which he was competent to make. When as a result of that order the property of the family was deemed for purposes of the Income-tax Act partitioned it was not open to the Income-tax Officer, Ahmedabad, to ignore the order either for the year in which the partition of the joint family property was recorded or for any subsequent year and to assess the income in the hands of T, U, K and A as if the original Hindu undivided family continued to exist.

Though among, T, U, K and A the property had not been divided by metes and bounds they could still not be assessed as members of a Hindu undivided family because such a relation did not exist between them after severance of the joint family status of the family in which C was the *karta*. The Income-tax Officer, Ahmedabad, in substance sought to revise the previous order passed by the Income-tax Officer, Bombay, recording partition under section 25-A and to revive the original family so as to make the income of T, U, K and A as well as of C liable to be assessed as if no partition had taken place and no partition of the joint family properties had been recorded under the Income-tax Act. That the Income-tax Officer was plainly incompetent to do.

Appeals from the Judgment and Order dated the 15th September, 1964 of the Gujarat High Court in Income-tax Reference No. 18 of 1963.

A. K. Sen, Senior Advocate, (O. P. Malhotra, Advocate and O. C. Mathur, Advocate of M/s. J. B. Dadachanji & Co., with him), for Appellants.

S. T. Desai, Senior Advocate, (S. K. Aiyar and R. N. Sachthey, Advocates with him), for Respondent.

The Judgment of the Court was delivered by

Shah, J.—Sir Chinubhai Madhavlal, Baronet, his wife Lady Tanumati and his three sons Udayan, Kirtidev and Achyut were originally assessed to income-tax in the status of a Hindu undivided family by the First Income-tax Officer, A-III Ward, Bombay. Sir Chinubhai filed Suit No. 2176 of 1948 in the High Court of Judicature at Bombay for partition and separate possession of his share in the joint family estate. On 8th March, 1950, the High Court of Bombay passed a decree by consent declaring that as from 15th October, 1947, the joint family stood dissolved and that all the members of the family had become separate in food, worship and estate from that date and that each member of the family was entitled to a fifth share in the properties movable and immovable belonging to the family, subject to the right of maintenance in favour of the mother of Sir Chinubhai. In Schedule A Part I properties which were allotted to Sir Chinubhai were set out : In Parts II & III of Schedule A properties which were collectively allotted to the share of Udayan, Kirtidev, Achyut and Lady Tanumati were set out. It was declared by the decree that the properties movable and immovable “described in Parts II & III of Schedule A shall absolutely belong to and vest in the four defendants” (the three sons and Lady Tanumati) “in equal shares in full satisfaction of their respective rights in the joint family properties subject, as regards the properties described in Part III of Schedule A, to the provisions of the Baronetcy Act” Schedules B, C & D set out the debts and liabilities of the joint family. Pursuant to the decree, Sir Chinubhai took his share in the properties allotted to him, separately. The other properties remained undivided between Udayan, Kirtidev, Achyut and Lady Tanumati—each holding a fourth share as tenants-in-common, with the other co-sharers.

On 3rd December, 1952, Sir Chinubhai applied to the Income-tax Officer, A-III Ward, Bombay, for an order recording the partition and requesting that assessments be made of the members of the family separately in accordance with the provisions of section 23 read with section 25-A of the Income-tax Act. The Income-tax Officer by order dated 6th January, 1953, granted the application. He observed that pursuant to the decree of the High Court for partition the properties of the “Hindu undivided family were distributed between two groups one consisting of Sir Chinubhai and the other consisting of his wife and his three sons”, and since all the conditions of section 25-A of the Indian Income-tax Act had been satisfied “from 8th March, 1950, the Hindu undivided family is deemed to have been partitioned and assessments subsequent to that date will be made on the two groups separately”. The Income-tax Officer, Ahmedabad, thereafter assessed Lady Tanumati and the sons of Sir Chinubhai separately.

The Income-tax Officer, Ahmedabad, however, initiated proceedings under section 34 of the Indian Income-tax Act, 1922, for the assessment years 1951-52, 1952-53 and 1953-54 for assessing the Hindu undivided family of the four members “Udayan, Kirtidev, Achyut and Lady Tanumati”—who will hereinafter collectively be called “the assesseees” on the plea that the income of the family had escaped assessment. The assesseees contended that they did not in the years of assessment referred to in the notice constitute a Hindu undivided family and the Income-tax Officer had no power, after the order passed on 6th January, 1953, to assess them in the status of a Hindu undivided family. The Income-tax Officer rejected the contention.

In appeal to the Appellate Assistant Commissioner the order of the assessment under section 34 was set aside. The Appellate Assistant Commissioner held that the decree passed by the High Court of Bombay brought about a complete disruption and severance of the joint status of the original family, and merely because the assesseees after severance had lived and traded together, they could not be assessed as a Hindu undivided family. He also held that after an order under section 25-A was passed by one Income-tax Officer, another Income-tax Officer had no power to modify it or to circumvent the same by seeking to assess the assesseees as a Hindu undivided family.

In appeal by the Income-tax Officer, Ahmedabad, the Appellate Tribunal restored the order passed by the Income-tax Officer. In the view of the Tribunal, by the decree of the High Court there was severance of the joint status between the members of the joint Hindu family, but the partition was partial, and "it did not follow that as regards the remaining persons or the remaining properties which had not gone out of the fold of the Hindu undivided family the assessment in respect thereof could not be made in the status of a Hindu undivided family." The Tribunal rejected the view that once an order under section 25-A (1) is passed, the Income-tax Officer is forever precluded from making assessment in the status of a Hindu undivided family. The Tribunal thereafter referred at the instance of the assessee the following question for the opinion of the High Court of Gujarat :

"Whether on the facts and in the circumstances of the case, the assessments made on the assessee as on a Hindu undivided family consisting of the three sons of Sir Chinubhai Madhavlal viz., Udayan, Kirtidev and Achyut and the wife of Sir Chinubhai Madhavlal, viz., Lady Tanumati, were correctly so made?"

The High Court answered the question in the affirmative. Against that order, these appeals have been preferred by the assessee.

An application under sub-section (1) of section 25-A of the Income-tax Act, 1922, by a Hindu undivided family or any member thereof that a partition has taken place among the the members of the family, invests the Income-tax Officer with authority to make an order recording that the joint family property has been partitioned, if he is satisfied on inquiry that the property of the family has been partitioned among the various members or groups of members "in definite portions". The jurisdiction may be exercised by the Income-tax Officer, even if there be partition between groups of the family. A complete partition in definite portions among all the members of the family is not a condition of the exercise of that jurisdiction. We do not agree with the plea raised by Counsel for the Department that by the expression "group of members" it is intended to refer to a group consisting of a head of a branch and his sons who remain undivided. Section 25-A (1) applies to families governed by the *Dayabhaga* school of Hindu law as well as the *Mitakshara* school of law : and if the interpretation suggested by Counsel for the Revenue be correct, the expression "group of members" will be meaningless in relation to a Hindu family governed by the *Dayabhaga* school of Hindu law.

But an order recording partition can be made only if the properties of the joint family are partitioned in "definite portions", that is, the properties are physically divided if they admit of such division, otherwise in such division as they admit of. In *Gordhandas T. Mangaldas v. Commissioner of Income-tax, Bombay*¹, the High Court of Bombay held that section 25-A contemplates a physical division of the joint family property; a mere division of interest in such property is not enough. Beaumont, C.J., in delivering the judgment of the Court observed at page 195 :

"I think that the expression 'definite portions' indicates a physical division in which a member takes a particular house in which he can go and live, or a piece of land which he can cultivate, or which he can sell or mortgage, or takes particular ornaments which he can wear or dispose of, and that the expression 'definite portions' is not appropriate to describe an undivided share in property where all that a particular member can claim is a proportion of the income, and a division of the corpus, but where he cannot claim any definite portion of the property * * *. No doubt the expression 'division in definite portions' will have to be construed with regard to the nature of the property concerned. A business cannot be divided into parts in the same manner as a piece of land ; division may only be possible in the books. Special cases will have to be dealt with by the Income-tax Officer when they arise. If he comes to the conclusion, that, having regard to the nature of the property, what has been done amounts to a division in definite portions, he will record his finding under sub-section (1); if he comes to the conclusion that it does not, then he will have to go on assessing the family under sub-section (3)."

There is no doubt that Sir Chinubhai took possession of his share in the family estate which was allotted to him. Between Sir Chinubhai and the assessee there was therefore, partition of the joint family property in definite portions. The shares allotted to the assessee were however not divided in definite portions *inter se*. It is

1. (1943) 11 I.T.R. 183; I.L.R. (1943) Bom. 245 : 43 Bom. L.R. 159; A.I.R. 1943 Bom. 116.

rule that Part II Schedule A of the decree described the settled properties under the Partition Act VIII of 1924 and those properties were not capable of physical division. However, Part III described properties movable and immovable which were not subject to any such statutory restrictions and those properties were not divided among the assesseees. But the assesseees constituted a group and between them and Sir Chinubhai there had been partition in definite portions—the portion of the property allotted to Sir Chinubhai being completely separated from the property allotted to the assesseees.

Under the decree of the High Court of Bombay the assesseees did not continue to remain members of an undivided Hindu family. It was expressly provided by the decree that the assesseees were divided *inter se* and held the property allotted to them as tenants-in-common. The effect of the order recording a partition was to recognize for purposes of income-tax administration that the joint family status was severed, and the property was divided in definite portions between groups of members of the family. After the order was recorded the original Hindu undivided family had no existence in fact or in point of law, personal or income-tax. Section 25-A (3) on which strong reliance was placed by Counsel for the Revenue only requires the Income-tax Officer to continue to assess a Hindu undivided family which has been divided under the personal law so long as no order under section 25-A (1) has been recorded. Once an order under section 25-A (1) has been recorded clause (3) of section 25-A has no application. If the members of the family who constituted a group between whom and the other group there has been a partition in definite portions constitute a Hindu undivided family, that group may undoubtedly be assessed as a Hindu undivided family : they may be so assessed because of their relation *inter se* and not by virtue of section 25-A (3).

The order passed by the Income-tax Officer, Bombay, was apparently a valid order which he was competent to make. When as a result of that order, the property of the family was deemed for purposes of the Income-tax Act partitioned, it was not open to the Income-tax Officer, Ahmedabad, to ignore the order either for the year in which the partition of the joint family property was recorded, or for any subsequent year, and to assess the income in the hands of the assesseees as if the original Hindu undivided family continued to exist. An order assessing the assesseees as members of a Hindu undivided family could be made after an order under section 25-A had been recorded only if it was proved that under the personal law they formed a joint Hindu family, and of that there was no evidence.

The contention raised on behalf of the Department which appealed to the Income-tax Officer and the Tribunal that the original Hindu undivided family of Sir Chinubhai Madhavlal continued to exist, notwithstanding the order of partition recorded under section 25-A (1), in our judgment, cannot be sustained. When the Income-tax Officer, Bombay, recorded an order that the property had been partitioned in definite portions, the family ceased to exist. It is true that among the assesseees the property had not been divided by metes and bounds, but they could still not be assessed as members of a Hindu undivided family because such a relation did not exist between them after severance of the joint family status of the family in which Sir Chinubhai was the *karta*. The Income-tax Officer, Ahmedabad, in substance sought to revise the previous order passed by the Income-tax Officer, Bombay, recording partition under section 25-A, and to revive the original family so as to make the income of the assesseees as well as of Sir Chinubhai liable to be assessed as if no partition had taken place and no partition of the joint family properties had been recorded under the Income-tax Act. That, the Income-tax Officer was plainly incompetent to do.

Counsel for the Revenue sought to support the order passed by the Income-tax Officer, Ahmedabad, and confirmed by the Tribunal, on the ground that it was open to the Income-tax Officer, notwithstanding the order passed under section 25-A (1) in a previous year to ignore that order in proceedings for assessment relating to a subsequent year, and to hold that there was no severance in fact between the members

of the family and to assess them as a Hindu undivided family, as if no partition had taken place. It was said that each assessment year is a self-contained unit and whatever view may have been taken in proceedings for assessment of an earlier year, it is open to this Income-tax Officer to arrive at an independent conclusion contrary to that decision in respect of another year, if the circumstances of the case so warrant. It is true that an assessment year under the Income-tax Act is a self-contained assessment period and a decision in the assessment year does not ordinarily operate as *res judicata* in respect of the matter decided in any subsequent year, for the assessing officer is not a Court and he is not precluded from arriving at a conclusion inconsistent with his conclusion in another year. It is open to the Income-tax Officer, therefore, to depart from his decision in subsequent years, since the assessment is final and conclusive between the parties only in relation to the assessment for the particular year for which it is made. A decision reached in one year would be a cogent factor in the determination of a similar question in a following year, but ordinarily there is no bar against the investigation by the Income-tax Officer of the same facts on which a decision in respect of an earlier year was arrived at. But this rule, in our judgment, does not apply in dealing with an order under section 25-A (1). Income from property of a Hindu undivided family "hitherto" assessed as undivided may be assessed separately if an order under section 25-A (1) had been passed. When such an order is made, the family ceases to be assessed as a Hindu undivided family. Thereafter that family cannot be assessed in the status of a Hindu undivided family unless the order is set aside by a competent authority. Under clause (3) of section 25-A if no order has been made, notwithstanding the severance of the joint family status, the family continues to be liable to be assessed in the status of a Hindu undivided family, but once an order has been passed, the recognition of severance is granted by the Income-tax Department, and clause (3) of section 25-A will have no application.

In *Commissioner of Income-tax, Delhi and Rajasthan v. Ganeshi Lal Sham Lal*¹, the High Court of Punjab held that when an order recognising the total disruption of a Hindu family has been passed under section 25-A of the Indian Income-tax Act, 1922, and an order of assessment is made on the basis of such an order, it is not open to the Income-tax Officer to take proceedings for reassessment under section 34 of the Act ignoring the earlier order under section 25-A of the Act on the ground that he has received information that the order under section 25-A was obtained by misrepresentation. The proper course for the Income-tax Officer to adopt in such a case is to move the Commissioner of Income-tax to take action under section 33-B of the Act to set aside the order under section 25-A.

We agree with the High Court of Punjab that section 34 of the Indian Income-tax Act confers no general power of reviewing an order passed under section 25-A (1) which is in its very nature effective for all subsequent years.

The answer to the question referred will be in the negative. The appellants will be entitled to their costs in this Court as well as in the High Court. One hearing.

T.K.K.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :— J.C. SHAH, V. RAMASWAMI AND V. BHARGAVA, JJ

Commissioner of Income-tax, Bombay City-I

.. Appellant*

v.

Godavari Sugar Mills, Ltd.

.. Respondent.

Income-tax Act (XI of 1922), section 23-A.—Deemed dividend—Dividend declared at Annual General Meeting—Maximum permitted under law then in force—Subsequent repeal of that law within six months of the meeting—Order of deemed distribution—Invalid.

Public Companies (Limitation of Dividends) Ordinance (XXIX of 1948), sections 3 and 12 and Public Companies (Limitation of Dividends) Act (XXX of 1949), section 13.

The respondent a Public Company, whose accounting year ended with 31st May, 1948 held its Annual General Meeting on 30th December, 1948, and declared a dividend of Rs. 3,68,433 the maximum permissible (6 % of the paid-up capital) under section 3 of the Public Companies (Limitation of Dividends) Ordinance XXIX of 1948 out of the profits of the year 1947-48 ; but the amount was far below, the percentage of the profits prescribed under section 23-A of the Income-tax Act. Penalty is provided by section 12 of the Ordinance for declaring dividends beyond the limits prescribed by section 3.

The said Ordinance (XXIX of 1948) was replaced and repealed by Public Companies (Limitation of Dividends) Act (XXX of 1949) which came into force on 26th April, 1949 within six months of the Annual General Meeting.

On 11th March, 1955 the Income-tax Officer passed an order under section 23-A overruling the contention of the respondent that it was precluded from paying dividend in excess of the limit fixed by the Ordinance. The said order was confirmed by the Assistant Commissioner in appeal and by the Appellate Tribunal on further appeal ; but the Tribunal referred to the High Court of Bombay the question whether on the facts of the case the order under section 23-A for the assessment year 1949-50, was validly passed. The High Court answered in favour of the assessee-respondent. On appeal by the Department.

Held: In view of the provision of section 23-A, it is clear that the order which the Income-tax Officer is empowered to make under that section is that the undistributed income shall be deemed to have been distributed among the share-holders "as at the date of the Annual General Meeting."

The legal fiction as enacted under section 23-A is that the notional distribution is not by the Income-tax Officer, but is by the Company itself at its Annual General Meeting.

The provision in section 3 of the Ordinance XXIX of 1948 prevented the respondent from declaring a higher dividend than that declared at the Annual General Meeting ; the Income-tax Officer would be likewise prevented from passing the order that a higher dividend shall be deemed to have been declared at that Annual General Meeting. The deemed declaration will suffer from the same restriction which an actual declaration is subject to.

Since there is a manifest repugnancy between the provisions of section 3 of the Ordinance and section 23-A of the Income-tax Act it must be taken as an implied repeal of section 23-A to the extent of that repugnancy so long as the Ordinance remained in force. Even for bringing a notional distribution into existence as a legal fiction there must be no prohibition such as that under the Ordinance in the instant case.

The contention that section 13 of Act XXX of 1949 repeals the Ordinance and thereby obliterates the Ordinance from the statute book and enables the Income-tax Officer to make the impugned order cannot be accepted for the following reasons. It is the law—the Ordinance prevailing at the date of the General Meeting that would govern the notional distribution ; further clauses (c), (d), and (e) of section 6 of General Clauses Act (X of 1897) are applicable to the instant case in respect of the provisions of sections 3, and 12 of the Ordinance.

The Ordinance was in force at the date of the holding of General Meeting of the respondent company and the Income-tax Officer had no power to pass an order under section 23-A.

Quaere : whether a company could not declare a second dividend within six months of the General Meeting?

Appeal by Special Leave from the Judgment and Order dated the 27th September, 1962, of the Bombay High Court in Income-tax Reference No. 39 of 1961.

S. T. Desai, Senior Advocate (*Gopal Singh* and *R. N. Sachthey*, Advocates, with him), for Appellant.

A. K. Sen, Senior Advocate (*O. P. Malhotra* and *Y. P. Tarvedi*, Advocates, and *Ravinder Narain*, Advocate of *M/s. J. B. Dadachanji & Co.*, with him), for Respondent.

The Judgment of the Court was delivered by

Ramaswami, J.—This appeal is brought, by Special Leave, from the judgment of the High Court of Bombay dated 27th September, 1962 in Income-tax Reference No. 39 of 1961. The respondent—Godavari Sugar Mills, Ltd.—is a public limited company. The assessment year in this case is 1949-50. The relevant accounting year ended on 31st May, 1948. The Annual General Meeting of the respondent was held on 30th December, 1948. At that meeting a sum of Rs. 3,68,433 was declared as the dividend. Since the dividend fell short of the requisite percentage under section 23-A of the Income-tax Act (hereinafter called the Act) the Income-tax Officer passed an order, on 11th March, 1955 under the provisions of section 23-A of the Act that the undistributed portion of the assessable income of the respondent of the previous year as computed for income-tax purposes and reduced by the amount of income-tax and super-tax payable by the company in respect thereof shall be deemed to have been distributed as dividend amongst the shareholders as at the date of the General Meeting. Section 23-A of the Act, as it stood at the material time, stated as follows :

"23-A. Power to assess individual members of certain companies.—(1) Where the Income-tax Officer is satisfied that in respect of any previous year the profits and gains distributed as dividends by any company up to the end of the sixth month after its accounts for previous year are laid before the company in General Meeting are less than sixty per cent. of the assessable income of the company of that previous year, as reduced by the amount of income-tax and super-tax payable by the company in respect thereof he shall, unless he is satisfied that having regard to losses incurred by the company in earlier years or to the smallness of the profits made, the payment of a dividend or a larger dividend than that declared would be unreasonable, make with the previous approval of the Inspecting Assistant Commissioner an order in writing that the undistributed portion of the assessable income of the company of that previous year as computed for Income-tax purposes and reduced by the amount of income-tax and super-tax payable by the company in respect thereof shall be deemed to have been distributed as dividends amongst the shareholders as at the date of the general meeting aforesaid ; and thereupon the proportionate share thereof of each shareholder shall be included in the total income of such shareholder for the purpose of assessing his total income".

The respondent raised an objection that it was not legally possible for it to declare a higher dividend than that declared in view of sections 3 and 12 of the Public Companies (Limitation of Dividends) Ordinance No. XXIX of 1948 (hereinafter referred to as the Ordinance) which was promulgated on 29th October, 1948. Section 3 of the Ordinance provided :

"No company shall, after the commencement of this Ordinance, distribute as dividend during any financial year, any sum which exceeds, or which when taken with any sum already distributed as dividend during the same year whether before or after the commencement of this Ordinance will exceed :

(a) six per cent of the paid-up capital of the company as on the last date of the period in respect of which the dividend is distributed, after deducting from such capital all amounts attributable to the capitalisation on or after the first day of April, 1946 of one or more of the following, namely, reserves, profits and appreciation of assets, or

(b) the average annual dividend of the company determined in the manner specified in sections 5 to 7, whichever is higher."

Section 12 provided :

"Any Director, Managing Agent, Manager or other Officer or employee of a company who contravenes or attempts to contravene or abets the contravention of or attempt to contravene any of the provisions relating to the distribution of dividend or the issue of preference shares, contained in this Ordinance or in any rule, notification or order issued thereunder, shall be punishable with imprisonment for a term which may extend to two years, or with fine, or with both."

Section 2 (b) of the Ordinance defines a "company" to mean "A public company as defined in clause (13-A) of section 2 of the Companies Act." It is not disputed by the parties that the respondent-company was a company within the meaning of the Ordinance and that the provisions of the Ordinance applied to it. It was also admitted that the dividend declared by the respondent complied with the requirements of the Ordinance. It was contended by the respondent that the Ordinance prohibited it from declaring any larger amount as dividend than that already declared by it. The contention was rejected by the Income-tax Officer. The order of the Income-tax Officer, dated 11th March, 1955 was confirmed by the Appellate Assistant Commissioner in appeal and, on further appeal, by the Tribunal. At the instance of the respondent the Tribunal referred the following question of law for the determination of the High Court :

"Whether on the facts of this case, an order under section 23-A for the assessment year 1949-50 was validly made in the case of this company to which the provisions of the Public Companies (Limitation of Dividends) Ordinance, 1948, applied on the date of the Annual General Meeting but to which the Act replacing the Ordinance ceased to apply within the period of 6 months referred to in section 23-A (1) ?"

By its judgment dated 27th September, 1962, the High Court answered the question of law in favour of the respondent.

In support of this appeal Mr. S. T. Desai put forward the argument that section 23-A of the Act contemplated a declaration of dividend not only on the date of the Annual General Meeting but also at any further point of time within a period of 6 months from the date of the Annual General Meeting. It was pointed out that the Ordinance was repealed by the Public Companies (Limitation of Dividends) Act (XXX of 1949) (hereinafter referred to as the 1949 Act) which came into force on 26th April, 1949. Section 2 (3) (1) of the 1949 Act removed the restriction imposed by the Ordinance with regard to Public Companies to which the provisions of sub-section (1) of section 23-A of the Act applied. It was submitted that it was possible for the respondent-company to declare further dividends within the said period of 6 months contemplated by section 23-A of the Act. The Annual General Meeting was held on 30th December, 1948 and the six months' period from that date expired on 30th June, 1949. The restrictions imposed by the Ordinance were lifted on 26th April, 1949 and so during the period from 26th April, 1949 to 30th June, 1949 it was possible for the respondent-company to declare further dividends and to comply with the requirements of section 23-A of the Act. It was argued that as the respondent-company failed to do so the Income-tax Officer was legally justified in making the order under section 23-A. On behalf of the respondent Mr. Sen contended that section 23-A (1) of the Act did not contemplate declaration of further dividend after the holding of the Annual General Meeting and, in any event, the provisions of the Companies Act did not permit the declaration of any further dividend after the holding of the Annual General Meeting. Mr. Sen referred to the decision of the Calcutta High Court in *Raghunandan Neotia v. Swadeshi Cloth Dealers Ltd.*¹, in support of this argument. It is not, in our opinion, necessary to express any concluded opinion on this aspect of the case, because we consider that, in any event, in view of the fact that the Ordinance was in force on the date of the holding of the Annual General Meeting of the respondent the Income-tax Officer had no power to pass any order under section 23-A of the Act. The Ordinance was in force on 30th December, 1948 on which date the Annual General Meeting of the respondent took place and a sum of Rs. 3,68,433 was declared as dividend. Section 23-A provides that on the fulfilment of certain conditions set out therein the Income-tax Officer shall make an order in writing that the undistributed portion of the assessable income of the respondent of the previous year as computed for income-tax purposes and reduced by the amount of income-tax and super-tax "shall be deemed to have been distributed as dividend amongst the shareholders as at the date of the General Meeting aforesaid." It is clear therefore that, the order which the Income-tax Officer is empowered to make under section 23-A of the Act is that the undistributed income

shall be deemed to have been distributed amongst the shareholders "as at the date of the Annual General Meeting." Now, the question is whether it was legally permissible for the Income-tax Officer to make the order which he has made on 11th March, 1955 in the present case. The legal fiction as enacted under section 23-A of the Act is that the undistributed portion of the assessable income is deemed to have been distributed as dividend amongst the shareholders as at the date of the Annual General Meeting. In other words, the notional distribution is not by the Income-tax Officer but is by the company itself at its Annual General Meeting. Since the provisions of the Ordinance imposed the restriction on the declaration of dividend beyond a particular limit that restriction will equally be binding for the Income-tax Officer, and if the respondent is prevented from declaring a higher dividend than that declared on the date of the Annual General Meeting, the Income-tax Officer would be likewise prohibited by the Ordinance from passing an order that a higher dividend than that actually declared shall be deemed to have been declared at the date of the respondent's Annual General Meeting. To put it differently, if in actuality a higher dividend could not lawfully have been declared by the respondent, the Income-tax Officer could not pass an order that such higher dividend should be deemed to have been declared, for the deemed declaration will suffer from the same legal restrictions which an actual declaration is subject to. In our opinion, the prohibition imposed by section 3 of the Ordinance applies not only to the actual dividend declared but also to notional dividend deemed to have been declared under section 23-A of the Act. There is a manifest repugnancy between the provisions of the Ordinance and of section 23-A of the Act and it must be taken that there is implied repeal of section 23-A of the Act to the extent of the repugnancy created by section 3 of the Ordinance and so long as the Ordinance remains in force. In view of the provisions of sections 3 and 12 of the Ordinance the fiction created by section 23-A cannot, therefore, be brought into existence and the Income-tax Officer cannot pass an order under the provisions of that section. As observed by Lord Asquith of Bishopstone in *East End Dwelling Co., Ltd. v. Finsbury Borough Council* :

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. One of those in this case is emancipation from the 1939 level of rents. The statute says that you must imagine certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

It is, indeed, true that as a result of the order of the Income-tax Officer there is no factual distribution of dividend but it is only a fictional or notional distribution of dividend which was not, in fact, received by the shareholders. The section merely enacts that notional dividend is deemed to have been distributed, as at the date of the Annual General Meeting, but even for bringing into existence that legal fiction there must be no statutory prohibition as the Ordinance in the present case.

We proceed to consider the next contention of the appellant that section 13 of the 1949 Act repealed the Ordinance completely and the effect of this section was that the Ordinance was obliterated from the Statute Book as if it never existed and, therefore, there was no bar in the way of the Income-tax Officer to make the order on 11th March, 1955. Section 13 of the 1949 Act provides as follows :

"13 (1). The Public Companies (Limitation of Dividends) Ordinance 1948 (XXIX of 1948) is hereby repealed.

(2) Notwithstanding such repeal, any rules made, action taken or thing done in exercise of any power conferred by or under the said ordinance shall be deemed to have been made, taken or done in exercise of the powers conferred by or under this Act as if this Act had come into force on the 29th day of October, 1948."

We are unable to accept this argument as correct. In the first place, the repeal of the Ordinance under section 13 of the 1949 Act is immaterial, for, as we have already stated section 23-A has created a fiction of distribution of the undistributed

income as dividend and the section further states that it would be deemed as if it was distributed on the date of the Annual General Meeting. Since the notional distribution contemplated by section 23-A of the Act is as if the notional distribution took place at the date of the Annual General Meeting it is the law which prevailed as on the date of the Annual General Meeting which has to be taken into account in considering the issue as to the legal validity of the order made by the Income-tax Officer. In the second place, Mr. S. T. Desai is not right in his contention that the effect of section 13 of the 1949 Act is to obliterate the Ordinance completely from the Statute Book. Section 6 of the General Clauses Act (X of 1897) states as follows :

"6. Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—

(a) revive anything not in force or existing at the time at which the repeal takes effect ; or
(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder ; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed ; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed ; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid ;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

The reason for enacting section 6 of the General Clauses Act has been described by this Court in *State of Punjab v. Mohar Singh*¹, as follows :

"Under the law of England, as it stood prior to the Interpretation Act of 1889, the effect of repealing a statute was said to be to obliterate it as completely from the records of Parliament as if it had never been passed, except for the purpose of those actions, which were commenced, prosecuted and concluded while it was an existing law. A repeal therefore without any saving clause would destroy any proceeding whether not yet begun or whether pending at the time of the enactment of the Repealing Act and not already prosecuted to a final judgment so as to create a vested right. To obviate such results a practice came into existence in England to insert a saving clause in the repealing statute with a view to preserve rights and liabilities already accrued or incurred under the repealed enactment. Later on, to dispense with the necessity of having to insert a saving clause on each occasion, section 38 (2) was inserted in the Interpretation Act of 1889 which provides that a repeal, unless the contrary intention appears, does not affect the previous operation of the repealed enactment or anything duly done or suffered under it and any investigation, legal proceeding or remedy may be instituted, continued or enforced in respect of any right, liability and penalty under the repealed Act as if the Repealing Act had not been passed. Section 6 of the General Clauses Act, as is well known, is on the same lines as section 38 (2) of the Interpretation Act of England."

Section 13 of the 1949 Act is almost identical in language with section 11 of Punjab Act XII of 1948 which was the subject-matter of consideration in *State of Punjab v. Mohar Singh*¹, and for the reasons given by this Court in that case the provisions of section 6 (c), (d) and (e) of the General Clauses Act are applicable to this case since there is no contrary intention appearing in the repealing statute. Mr. S. T. Desai is, therefore, unable to make good his submission on this aspect of the case.

For these reasons we affirm the judgment of the Bombay High Court dated 27th September, 1962 and dismiss this appeal with costs.

T.K.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction.)

PRESENT :—K. N. WANCHOO, J. R. MUDHOLKAR AND S. M. SIKRI, JJ.
 Rai Sahib Dr. Guranditta Mal Kapur .. Appellant*

Mahant Amar Dass Chela Mahant Ram Saran and others .. Respondents.

Limitation Act (IX of 1908), Article 144—Land leased to an Akhara—Unauthorised sub-lease by Mahant of Akhara—Landlord obtaining possession of such land under a decree for ejectment—Suit by succeeding Mahant for recovery of possession of the land—Limitation.

In Mukherjee's Hindu Law of Religious and Charitable Trust (2nd Edition) it is pointed out that in the case of an execution sale of debutter property it is not the date of death of the incumbent of the Mutt but the date of effective possession as a result of the sale from which the commencement of the adverse possession of the purchaser is to be computed for the purposes of Article 144 of the Limitation Act. This principle will also apply to a case where lands leased to an Akhara is sub-leased by its Mahant illegally and the landlord after forfeiting the tenancy files a suit for ejectment and obtains possession of the lands in execution of the decree passed thereon. In such a case a suit filed by a succeeding Mahant after the landlord has completed 12 years of possession under the decree to the exclusion of the tenant would be barred by time even if the suit is filed within 12 years of such Mahant's succession.

A Mahant of an Akhara represents the Akhara and has both the right to institute a suit on its behalf as also the duty to defend one brought against. A decree made against a Mahant as representing an Akhara would be binding on the succeeding Mahant also.

Where a landlord forfeits a tenancy and obtains possession in execution of a decree, in no sense can this be regarded as, or even likened to alienation, which is a voluntary act of the alienor in favour of the alienee.

Appeal by Special Leave from the Judgment and Decree, dated 9th November, 1960 of the Punjab High Court in Regular Second Appeal No. 1627 of 1960.

S. V. Gupta, Solicitor-General of India (B. K. Khanna, Advocate and R. K. Garg, D.P. Singh, S.C. Agarwal and M. K. Ramamurthi, Advocates of M/s. Ramamurthi & Co., with him), for Appellant.

N. C. Chatterjee, Senior Advocate (M. S. Gupta, Advocate, with him), for 1st Respondent.

P. K. Chatterjee and R. H. Dhebar, Advocates, for 2nd Respondent.

The Judgment of the Court was delivered by

Mudholkar, J.—The short point which falls to be considered in this appeal by Special Leave from a judgment of the High Court of Punjab dismissing the appellant's appeal *in limine* is whether the suit for possession instituted by the plaintiff-respondent No. 1 is within time. There are ten respondents to the appeal out of whom only two, the plaintiff-respondent No. 1 Amardas and respondent No. 11, Union of India are represented. While the appeal is contested by the first respondent it is supported by the Union of India. The facts which are not disputed before us are briefly these :

The appellant has a share of 122½/148½ in the land in suit. The occupancy tenant of this land is Akhara Nirbansar of Sultanwind Gate, Amritsar. The second respondent Ram Saran Das was Mahant of this Akhara till the year 1950 when he was removed by virtue of an order made by a civil Court in a suit under section 92 of the Code of Civil Procedure, confirmed in appeal on 11th September, 1950. On 29th December, 1953 respondent No. 1 was appointed as Mahant in place of respondent No. 2.

On 15th September, 1939 the appellant instituted a suit in a Revenue Court under sections 38 and 39 of the Punjab Tenancy Act (hereafter referred to as the Act) for possession of 141 kanals 8 marlas of land on the ground that he had granted

a sub-lease thereof for the manufacture of bricks to some one by utilising earth dug up from that land. This, according to the appellant, was in contravention of the provisions of section 39 of the Act and entitled him to eject respondent No. 2. The Revenue Court held that out of the land sub-leased by respondent No. 2 only a certain portion was dug up by the sub-lessee and, therefore, the ejectment of the second respondent was confined to that area of land which had been dug up. The date of the ejectment decree was 3rd June, 1940. The second respondent preferred an appeal before the Collector from that decree which was dismissed on 19th October, 1940. Shortly thereafter the appellant obtained possession of the land from which the second respondent was ordered to be ejected. The lessee of the second respondent, however, continued to dig up the rest of the land and, therefore, the appellant instituted a second suit for the ejectment of the second respondent therefrom. The Assistant Collector who tried the suit granted a decree to the appellant in respect of the entire land which was left with the second respondent after he was dispossessed from a part of the land leased to him under the earlier decree. In appeal, however, the Collector modified the order of ejectment by leaving out of the land 79 kanals and 14 marlas. This order was made on 31st May, 1943. Shortly thereafter the appellant obtained possession of the land with respect to which the Collector had confirmed the order of ejectment in the appeal.

On 18th March, 1957 the first respondent instituted a suit against the appellant and the second respondent. According to respondent No. 1 Akhara Nirbansar was not bound by the actions of Mahant Ram Saran Das, the second respondent, which were tantamount to alienation of the land which, according to him, were neither for legal necessity nor for the benefit of the estate. He contended that on the contrary the action of Ram Saran Das in alienating the land was unauthorised and illegal and because what he did was not for legal necessity nor for conferring any benefit on the estate.

The appellant contested the suit on two main grounds. The first was that the land in question was never attached to the Akhara but that Mahant Ram Saran Das, the second respondent, was its occupancy tenant and that as the sub-lessee of the land had dug it up and rendered it unfit for cultivation the appellant as the owner of the land was entitled to eject respondent No. 2 by forfeiting the lease. He denied that the land was wakf property and contended that the occupancy rights existing in favour of the second respondent were extinguished by the orders of the Revenue Courts which still hold good. The second point was that as the appellant was in continuous possession of the land in suit as owner in his own right for more than 12 years preceding the suit openly and to the exclusion of the second respondent and respondent No. 1 the suit was barred by time.

In his replication respondent No. 1 reiterated that the property in suit belongs to and is owned by the Akhara Nirbansar as its occupancy tenant and that the second respondent was never its occupancy tenant. Therefore, according to him, there was no question of extinguishment of occupancy rights in consequence of the two decrees made by the Revenue Courts. He contended that the action of the second respondent in leasing out the land for digging up earth was a transfer which, not being for legal necessity nor for the benefit of the estate, was unauthorised. According to him the mere fact that the appellant was in possession of the land for more than 12 years makes no difference to the suit and that the land being trust property a suit for its recovery could be brought within 12 years from the date of "death, resignation or removal" of the manager of such a property. He added that there was no question of the appellant being in possession in his own right of the land for more than 12 years. The suit was decreed by the trial Court and its decision was upheld in appeal by the Second Additional District Judge, Amritsar. The appellant's second appeal was dismissed *in limine* by the High Court.

Upon the view which we take on the question of limitation it has become unnecessary to decide the other points.

The learned Solicitor-General who appears for the appellant relies strongly upon the averments of the appellant in his written statement that he is occupying

the land in suit for a period of over 12 years from the date of the institution of the suit as owner in his own right and not as an occupancy tenant and that even if his occupation is regarded to be that of an occupancy tenant as alleged by the first respondent, he has acquired the proprietary rights in this property by operation of statute. The Solicitor-General relies on the further averments to the effect that the original occupancy tenant of the land was the second respondent and not the Akhara and also contented that whether it was one or the other that made no difference. For, the tenant's occupancy rights were extinguished by the decree passed in the ejectment suits and consequently there was no cause of action for the present suit. As pointed out by the learned Solicitor-General, respondent No. 1, in his replication has not disputed the fact that the appellant was in possession for more than 12 years before the institution of the suit and that the only way in which he tried to meet it was by saying that this fact made no difference to his case.

It seems to us clear that upon the eviction of respondent No. 2 from a part of the land in the year 1940 and the rest of it in the year 1943 the occupancy right with respect to the land merged in the right of ownership of the appellant. Apart from that it is clear that the actual physical possession of the land, having been continuously with the appellant to the exclusion of the occupancy tenant, whether it was respondent No. 1 or the Akhara itself, for a period more than 12 years before the institution of the suit that right was extinguished.

Mr. Gupta, learned Counsel for respondent No. 1, however, sought to meet this position by urging that the second respondent's act amounted to an alienation that it was not established that it was for legal necessity and that, therefore, respondent No. 1 as the successor of respondent No. 2 to the office of Mahantship of the Akhara could institute a suit within 12 years of his succession to the office. The succession to the office must, according to him, be deemed to have occurred upon the dismissal in the year 1950 of the appeal preferred by respondent No. 2 against the decision of the trial Court removing him from Mahantship; later the respondent No. 1 was appointed a Mahant. That was on 12th December, 1953. The suit having been filed within 12 years of that date, so Mr. Gupta contends must be held to be within time. The simple answer to this contention is that what happened in this case was the forfeiture of the occupancy tenancy by the appellant as landlord. In no sense can this be regarded as, or even likened to alienation which is a voluntary act of the alienor in favour of the alienee. The appellant is thus not an alienee from the respondent No. 2 Ram Saran Das.

Mr. N. C. Chatterjee who also appeared for the first respondent raised a novel contention. According to him, adverse possession against the Akhara, which was the real occupancy tenant, could not commence till respondent No. 1 was appointed as Mahant because during the interval there was no person who was competent to institute a suit on behalf of the Akhara for the possession of the lands of which the appellant was in adverse possession. In support of the contention he has placed reliance upon the decision in *Dwijendra Narain Ray v. Jages Chandra De¹*. In particular learned Counsel has relied upon the following observations of Mookerjee, J., who delivered the judgment of the Court. They are:

"The substance of the matter is that time runs when the cause of action accrues, and a cause of action accrues, when there is in existence a person who can sue and another who can be sued The cause of action arises when and only when the aggrieved party has the right to apply to the proper tribunals for relief. The statute (of limitation) does not attach to a claim for which there is as yet no right of action and does not run against a right for which there is no corresponding remedy or for which judgment cannot be obtained. Consequently the true test to determine when a cause of action has accrued is to ascertain the time when plaintiff could first have maintained his action to a successful result." (p. 609).

He further brought to our notice that these observations have received the approval of this Court in *P. Lakshmi Reddy v. L. Lakshmi Reddy²*, at page 206. In the case which came up before this Court the facts which are set out in the head-note were as follows:

1. A.I.R. 1924 Cal. 600.

2. (1957) 1 M.L.J. (S.C.) 46 : (1957) S.C.J.

248 : (1957) 1 An.W.R. (S.C.) 46 : (1957) S.C.R. 195 (206) : A.I.R. 1957 S.C. 314.

"V died an infant in 1927 and H, an agnatic relation filed a suit for the recovery of the properties belonging to V which were in the possession of third parties, on the ground that he was the sole nearest male agnate entitled to all the properties. During the pendency of the suit a Receiver was appointed for the properties in February, 1928. The suit having been decreed H obtained possession of the properties from the Receiver on 20th January, 1930, and after his death in 1937, his nephew, the appellant, got into possession as H's heir. On 23rd October, 1941 the respondent brought the present suit for the recovery of a one-third share of the properties from the appellant on the footing that he and his brother were agnatic relations of V of the same degree as H, that all the three were equal co-heirs of V and that H obtained the decree and got into possession on behalf of all the co-heirs. The appellant resisted the suit and contended that the respondent lost his right by the adverse possession of H and his successor and that for this purpose not only the period from 20th January, 1930 to 23rd October, 1941 was to be counted but also the prior period when the Receiver was in possession of the properties during the pendency of H's suit. It was found that the respondent's case that H obtained the decree and got possession from the Receiver on behalf of the other co-heirs was not true."

The facts of that case were different and it was on these facts that this Court held that the respondent did not lose his right by adverse possession.. It is in the context of these facts that the learned Judges cited with approval the observations of Mookerjee, J., which we have set out. Assuming these observations are sound, it cannot be said in the case before us that at any point of time there was no person who was competent to institute a suit on behalf of the Akhara. Respondent No. 2 was still the Mahant and could well have instituted a suit on behalf of the Akhara if in fact there was any cause of action for such a suit. Further, in the course of the suit the possession was with a Receiver who had been appointed by the Court and was thus competent in law to institute a suit.

We may point out that a Mahant of an Akhara represents the Akhara and has both the right to institute a suit on its behalf as also the duty to defend one brought against it. The law on the subject has been stated very clearly at pages 274 and 275 in Mukherjea's Hindu Law of Religious and Charitable Trusts, 2nd Edition. It is pointed out that in the case of an execution sale of debutter property it is not the date of death of the incumbent of the Mutt but the date of effective possession as a result of the sale from which the commencement of the adverse possession of the purchaser is to be computed for the purposes of Article 144 of the Limitation Act. This is in fact what the Privy Council has laid down in *Sudarsan Das v. Ram Kripal*¹. A similar view has been taken by the Privy Council in *Subbaiya v. Mustapha*². What has been said in this case would also apply to a case such as the present. Thus if respondent No. 2 could be said to have represented the Akhara in the two earlier suits, decrees made in them would bind the respondent No. 1 as he is successor-in-office of respondent No. 2. On the other hand if respondent No. 2 did not represent the Akhara, the possession of the appellant under the decree passed in these suits would clearly be adverse to the Akhara upon the view taken in the two decisions of the Privy Council just referred to. The first respondent's suit having been instituted after the appellant had completed more than 12 years of adverse possession must, therefore, be held to be barred by time. For these reasons disagreeing with the Courts below we set aside the decrees of the Courts below and instead dismiss the suit of respondent No. 1 with costs in all the Courts.

V.K.

Appeal allowed.

1. (1949) L.R. 77 I.A. 42; (1950) 1 M.L.J. 43; A.I.R. 1950 P.C. 44.

2. (1923) L.R. 50 I.A. 295; 1 I.L.R. 46 Mad. 751; 45 M.L.J. 588; A.I.R. 1923 P.C. 175

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. H. TULLAH AND V. RAMASWAMI, JJ.

The All India Reserve Bank Employees' Association
and another

... Appellants*

v.

The Reserve Bank of India and another

... Respondents.

Industrial Disputes Act (XIV of 1947) (as amended in 1956), sections (2) (k), 2 (s) (iv) and 10 (3) Supervisor when ceases to be a workman under section 2 (s) (iv)—Word "Supervise" and its derivatives—All of—Class II staff of Reserve Bank of India if employed in supervisory capacity—Reference under sec (1-A) of dispute in regard to supervisors drawing less than Rs. 500 per month but on scales carrying them Rs. 500—If without jurisdiction—Industrial dispute by whom can be raised—If can be raised on behalf of workmen.

Industrial dispute—Minimum wage, fair wage and living wage—Meaning of—Fixation of minimum wages in Reserve Bank of India—Acceptance of norms laid down in the Resolution adopted by the Fifteenth Labour Conference—Practicability—Wages of middle class staff in relation to wages of working classes—Denial—Proper co-efficient.

Industrial dispute—Promotion—Seniority and merit should both have a part—Gratuity—Forfeiture of gratuity—Legality—Fixation of period for confirmation and probation—No hard and fast rule can be laid down—Claim by union that it should be allowed to participate in disputes between an individual workman and the management—Tenability.

Industrial Disputes Act (XIV of 1947), section 17-A—Industrial award—When comes into operation—Creation of Tribunal to fix commencement date—Interference by Supreme Court—Practice.

The Central Government in exercise of its powers under section 7-B of the Industrial Disputes Act constituted a National Industrial Tribunal and in exercise of the powers conferred by section 10 (1) referred an industrial dispute which in its opinion existed between the Reserve Bank and its workmen belonging to the Class II, Class III and Class IV Category. The National Tribunal in considering the demands of Class II staff came to the conclusion that it could not give any award regarding the employees who were employed in a supervisory capacity. It pointed out that the demand by Class II supervisory staff envisaged a scale commencing at Rs. 500 per month and that if the demand were considered favourably every one in that class would, having regard to section 2 (s) (iv), cease to be a workman and such an award was beyond its jurisdiction to make. The National Tribunal held that even though by reason of community of interest other workmen might be entitled, having regard to the definition of "industrial dispute" to raise a dispute on behalf of others, they could not raise a dispute either on their own behalf or on behalf of others, when the dispute would involve consideration of matters in relation to non-workmen. It also held that it would even be beyond the jurisdiction of Central Government to refer such a dispute. Those employed in supervisory capacity and drawing more than Rs. 500 per month were treated as not present before the National Tribunal and as they could not be heard, the National Tribunal found it inexpedient to fix scales of salary affecting them. As regards those employed in the same capacity but drawing less than Rs. 500 per month but on scales carrying them beyond that mark, the National Tribunal thought that if all that it could do was to fix a scale up to Rs. 500 it would be unfair to lower the scale already fixed. The National Tribunal thus made no award regarding supervisory staff in Class II.

With regard to fixation of minimum wage it was argued before the National Tribunal that it should be fixed on the basis of the Tripartite Resolution adopted by the Fifteenth Indian Labour Conference. The Tripartite Resolution provided *inter alia*, that in fixing the minimum wage, the standard workman's family should be taken to consist of 3 consumption units for one earner and the minimum requirement should be calculated on the basis of a net intake of 2,700 calories for an average Indian adult. It was also contended that to determine the wages of the middle class staff in relation to the wages of the working classes the proper co-efficient to be adopted should be 120 per cent. i.e., an increase of 20 per cent. over the remuneration of the latter. The National Tribunal while appreciating the importance of the Tripartite Resolution, was not prepared to act on it because it standardised and was not applicable to all industrial workers whatever their age or the number of years of service or the nature of their employment. It felt there was difficulty in accepting the basis of three consumption units

stages of service or the net intake of 2,700 calories at all ages. The National Tribunal accepted 2.25 consumption units instead of 3. With regard to the co-efficient for determining the wages of the middle class in relation to the working classes the National Tribunal did not see the need for changing the co-efficient already established at 80 per cent.

In appeal by Special Leave against the award of the National Tribunal.

Held, "Workman" under the Industrial Disputes Act (XIV of 1947), as amended in 1956 includes an employee employed as supervisor. There are only two circumstances in which such a person ceases to be a workman. Such a person is not a workman if he draws wages in excess of Rs. 500 or if he performs managerial functions by reason of a power vested in him or by the nature of duties attached to his office. The person who ceases to be a workman is not a person who does not answer the description "employed to do supervisory work" within the meaning of section 2 (s) but one who does answer that description. He goes out of the category of workman on proof of the circumstances excluding him from the category. The unity between the opening part of the definition in section 2 (s) and clause (iv) thereof was expressly preserved by using the word *such* twice in the opening part. The words which bind the two parts are "but does not include any *such* person" showing clearly that what is being excluded is a person who answers the description "employed to do supervisory work". The argument therefore that section 2 (s) (iv) excludes only a workman employed to do plain supervision as opposed to one who both supervises and works is untenable.

The word "supervise" and its derivatives are not words of precise import and must often be construed in the light of the context, for unless controlled, they cover an easily simple oversight and direction as manual work coupled with a power of inspection and superintendence of the manual work of others. The question whether a particular workman is a supervisor within or without the definition of workman in section 2 (s) is ultimately a question of fact, at best one of mixed fact and law and will really depend upon the nature of the industry, the type of work in which he is engaged, the organisational set up of the particular unit of industry and like factors. The work in a bank involves layer upon layer of checkers and checking is hardly supervision but where there is a power of assigning duties and distribution of work there is supervision. Class II staff of the Reserve Bank employees distribute work, detect faults, report for penalty, make arrangements for filling vacancies, to mention only a few of the duties which are supervisory and not merely clerical and so the Class II employees of the Reserve Bank, except the Personal Assistants, are employed on supervisory duties.

Thus while the National Tribunal was right in classifying Class II staff of the Reserve Bank of India except Personal Assistants as being employed in supervisory capacity it was not justified in ignoring that class altogether. The National Tribunal was not justified in holding that if at a future time an incumbent would draw wage in the time scale in excess of Rs. 500, the matter must be taken to be withdrawn from the jurisdiction of the Central Government to make a reference in respect of him and the National Tribunal to be ousted of the jurisdiction to decide the dispute if referred. Supervisory staff drawing less than Rs. 500 per month cannot be debarred from claiming that they should draw more than Rs. 500 per month presently or at some future stage in their service. They can only be deprived of the benefits if they are non-workmen at the time they seek the protection of the Industrial Disputes Act.

Further, the definition of "industrial dispute" in section 2 (k) contemplates a dispute between employers and employers, or employers and workmen, or workmen and workmen; but it must be a dispute which is connected with the employment or non-employment or with the conditions of labour of *any person*. The word *person* has not been limited to workman as such and must, therefore, receive a more general meaning. But it does not mean any person unconnected with the disputants in relation to whom the dispute is not of the kind described. It could not have been intended that though the dispute does not concern them in the least, workmen are entitled to fight it out on behalf of non-workmen. It may, however, be said that if the dispute is regarding employment, non-employment, terms of employment or conditions of labour of non-workmen in which workmen are themselves vitally interested, the workmen may be able to raise an industrial dispute. Workmen can, for example, raise a dispute that a class of employees not within the definition of workman should be recruited by promotion from workmen. When they do so the workmen raise a dispute about the terms of their own employment though incidentally the terms of employment of those who are not workmen is involved. But workmen cannot take up a dispute in respect of a class of employees who are not workmen and in whose terms of employment those workmen have no direct interest of their own. What direct interest suffices is a question of fact but it must be real and positive interest and not fanciful or remote. It follows, therefore, that the National Tribunal was in error in not considering the claims of Class II employees.

of the Reserve Bank whether at the instance of members drawing less than Rs. 500 as wages or at the instance of those lower down in the scale of employment.

Minimum wage, as the name itself implies represents the level below which wage cannot be allowed to drop. It was described as the *wage floor* allowing living at a standard considered socially, medically and ethically to be the acceptable minimum. The concept of fair wages involves a rate sufficiently high to enable the worker to provide "a standard family with food, shelter, clothing, medical care and education of children appropriate to his status in life but not at a rate exceeding the wage earning capacity of the class of establishment concerned". A fair wage thus is related to a fair workload and the earning capacity. The living wage concept is one or more steps higher than fair wage. It is one appropriate for the normal needs of average employee regarded as a human being living in a civilized community. It has now been generally accepted that living wage means that every male earner should be able to provide for his family not only the essentials but a fair measure of frugal comfort and an ability to provide for old age or evil days. Fair wage lies between the concept of minimum wage and the concept of living wage.

The National Tribunal was not wrong in refusing to accept the norms laid down by the Tripartite Resolution in determining the minimum wage for the Reserve Bank employees. The Reserve Bank is not a profit-making commercial undertaking and is not a proper place to determine what the need-based minimum wage should be and for initiating it. Nor was the National Tribunal wrong in accepting 2.25 consumption units instead of 3 as suggested in the Resolution. But 3 consumption units must be provided for by the end of five years' service and the consumption units for the first five years must be graduated.

The difference in the cost of living between the members of the clerical staff and the subordinate staff has been held by many well-known authorities to be an increase of 80 per cent. over the remuneration of the latter. The National Tribunal not having any data refused to accept the demand for fixing the co-efficient at 120 per cent. and preserved it at 80 per cent. The Supreme Court is in no better position and until fresh and comprehensive enquiries are conducted there is no alternative but to adhere to the co-efficient already established *viz.*, 80 per cent.

Seniority and merit should ordinarily both have a part in promotion to higher ranks and seniority and merit should temper each other.

Gratuity is not a gift but is earned and forfeiture of gratuity on dismissal for misconduct is not justified except to the extent to which the misconduct of the worker has caused loss to the establishment. Counsel for the Reserve Bank undertook to get Rule 5 (1) (b) of the Reserve Bank of India (Payment of Gratuity to Employees) Rules, 1947 brought in line with this view.

The question of fixation of period for confirmation and probation are matters of internal management and no hard and fast rule can be laid down in this matter.

The demand made by the union that it should be allowed to participate and represent workers in disputes between an individual workman and the Reserve Bank cannot be accepted for the reason that if unions intervene in every industrial dispute between an individual workman and the establishment the internal administration would become impossible.

Ordinarily, an award comes into operation from the time stated in section 17-A (1) of the Industrial Disputes Act. The Tribunal, however, is given the power to order that its award shall be applicable from another date and a discretion exercised on judicial principles by the Tribunal about the commencement of the award should not be interfered with.

Appeal by Special Leave from the Award dated 8th September, 1962 of the National Industrial Tribunal (Bank Disputes) at Bombay in Reference No. 2 of 1960.

A. S. R. Chari, Senior Advocate (*D. S. Nargolkar*, *K. Rajendra Chaudhury* and *K. R. Chaudhuri*, Advocates, with him), for Appellants.

N. A. Palkhivala, Senior Advocate (*N. V. Phadke* and *R. H. Dhebar*, Advocates, with him), for Respondent No. 1.

Aliqur Rehman and *K. L. Hathi*, Advocates, for Respondent No. 2.

The Judgment of the Court was delivered by

Hidayatullah, J.—This is an appeal by Special Leave from the Award of the National Industrial Tribunal (Bank Disputes), Bombay in a dispute between the

Reserve Bank of India and its workmen, delivered on 8th September, 1962 and published in the Gazette of India (Extraordinary) of 29th September, 1962. The appellants are the All India Reserve Bank Employees' Association, Bombay (shortly the Association) representing Class II and Class III staff and the All India Reserve Bank "D" Class Employees' Union, Kanpur (shortly the Union) representing Class IV staff of the Reserve Bank.

By notification No. S.O. 704 dated the 21st March, 1960, the Central Government, in exercise of its powers under section 7-B of the Industrial Disputes Act, 1947, constituted a National Industrial Tribunal with Mr. Justice K. T. Desai (later Chief Justice of the Gujarat High Court) as the Presiding Officer. By an order notified under No. S.O. 707 of the same date, the Central Government, in the exercise of the powers conferred by sub-section (1-A) of section 10 of the Industrial Disputes Act, referred an industrial dispute, which, in its opinion, existed between the Reserve Bank and its workmen of the three classes above-mentioned. The order of Reference specified the heads of dispute in two schedules, the first in respect of Class II and Class III staff and the second in respect of Class IV staff. The first schedule consisted of 22 items and the second of 23 items. These items (a considerable number of which are common to the two schedules) bear upon the scales of pay and dearness and other allowances and sundry matters connected with the conditions of service of the three classes. The reference was registered as Reference No. 2 of 1960. During the trial of the Reference the Association and the Union severally made applications for interim relief asking for 25 per cent. of the total emoluments to Class IV employees with a minimum of Rs. 25 and for 25 per cent. of the basic pay to the employees of the two higher classes, with effect from July, 1959, but this was refused by an interim award dated 29th December, 1960. The final Award was delivered on 8th September, 1962 because in the meantime the Tribunal dealt with another reference registered as Reference No. 1 of 1960 in a dispute involving 84 banking companies and Corporations and their workmen in respect of creation of categories of banks and areas for purposes of adjudication and of scales of pay, diverse allowances and other conditions of service. The award in that Reference was delivered on 7th June, 1962. The Tribunal was next occupied with the resolution of yet another dispute over bonus between 73 banking companies and their workmen which was registered as Reference No. 3 of 1960 and which was concluded by an award on 21st July, 1962. We shall have occasion to refer to these awards later. We may now give the facts of the dispute in the Reference from which this appeal arises.

The Reserve Bank was established on 1st April, 1935 as a shareholders' Bank with a capital of Rs. 5 crores which was mainly subscribed by the public. It was taken over in 1948 by the Government of India, when, under the Reserve Bank (Transfer to Public Ownership) Act, 1948, the shares were compulsorily acquired by Government at a premium of Rs. 18.62 over and above the face value of the share of Rs. 100. Thereafter the Reserve Bank is administered by a Central Board of Directors nominated by the Central Government from the civil services and public men. There are four Local Boards to advise the Central Board and to function as its delegates. The Head Office of the Reserve Bank is situated at Bombay with branches at Calcutta, New Delhi, Kanpur, Madras, Bangalore, Nagpur, Lucknow, Hyderabad, Gauhati, Trivandrum, Patna, Ahmedabad, Ludhiana, Jaipur and Indore. The Reserve Bank acts as Bank to the Central and State Governments and Commercial Banks and controls the issue and circulation of currency. It has special duties to perform under the Banking Companies Act, 1949, and supervises and controls the banking industry in India. It regulates and controls foreign exchange and exchange of currency and remittances to and from India. It is hardly necessary to refer to its multifarious duties and functions as the Central Bank and as the bankers' bank.

The Reserve Bank employs four classes of employees of which the three lower classes are before this Court, the first class being of officers. At the material time

the total number of employees of all description was about 9,500 of which 3,300 were in the Head Office, 1,800, 1,100 and 1,100 respectively at Calcutta, New Delhi and Madras and the rest were distributed in varying numbers among the remaining twelve branches. The present dispute has a long history into the details of which it is hardly necessary to go but as both sides have made reference to it, some of the leading events connected with bank disputes in general and the present dispute respecting the Reserve Bank, in particular, may be mentioned.

As is well-known there has been a rise in the prices of commodities since 1939 and workmen earning wages and persons in the fixed income groups are specially affected. Between the years 1946 and 1949 there were set up numerous Commissions and Tribunals to deal with disputes between the commercial banks and their employees. In 1946 strike notices were served on many banks in Bombay, Bengal and the United Provinces. In Bombay Mr. H. V. Divatia dealt with a dispute between the Bank of India and its employees, happily settled by consent (15th August, 1946) and again with a dispute between 30 named Banks in Bombay and their employees. The Award was given on 9th April, 1947. That award was extended to Ahmedabad Bank employees by another award published on 22nd April, 1948. Conciliation proceedings were conducted by Mr. R. Gupta between the Imperial Bank of India and its employees in Bengal which concluded on 4th August, 1947. Other awards and adjudications were made by Mr. S. C. Chakravarti and Mr. S. K. Sen. In the United Provinces first Mr. B. B. Singh, Labour Commissioner, began arbitration in disputes between as many as 40 banks and their employees, which later went before Conciliation Boards headed first by Mr. Nimbkar, and on his death, by Mr. Bind Basni Prasad and the recommendations were made effective by a Government order. On the representation of the Banks an Ordinance was promulgated (followed by an Act) and the Central Government took over the resolution of disputes between banks and their employees in all cases where the banks had offices in more than one province. On 13th June, 1949 the Central Government appointed an All India Industrial Tribunal (Bank Disputes) with Mr. K. C. Sen and 2 members to codify the terms and conditions of service of bank employees. The Sen Award (as it is known) was published on 12th August, 1950 but on appeal this Court on 9th April, 1951 declared it to be void as there was a flaw in the composition of the Tribunal. As a result of this contingency a stand-still Act was passed and another Tribunal with Mr. H. V. Divatia and 2 members was erected. This Tribunal did not conclude the work and resigned and in 1952 another Tribunal presided over by Mr. S. Panchapagesa Sastry was appointed which published its award in April, 1953. That Award was subjected to an appeal before the Labour Appellate Tribunal and it was much modified. Some banks represented to Government their inability to implement the modified award and the Central Government intervened and modified the award of the Labour Appellate Tribunal by an order dated 24th August, 1954. We may leave this general narration at this stage to view the disputes between the Reserve Bank of India and its employees during the same period.

In 1946 the Association delivered a charter of demands for revision of pay scales and allowances of the employees of the Reserve Bank from 1st April, 1946 and after negotiations some revision in wages and dearness allowances was effected. During the interval between this revision and the appointment of the Sastry Tribunal other revisions took place. When the Sastry Tribunal gave its award in March, 1953 the Association in May of the same year delivered a revised charter of demands to the Reserve Bank but owing to the pendency of the Appeal before the Labour Appellate Tribunal, the demand could not be considered. The Reserve Bank, however, assured its employees that after the decision of the Labour Appellate Tribunal was known, the entire question would be reviewed. Then the Labour Appellate Tribunal gave its decision in April, 1954, the Association served a fresh charter of demands on 18th May, 1954 but the decision of the Appellate Tribunal was modified by Government and on 17th September, 1954 a commission presided over by Mr. Justice Rajadhykshya and later by Mr. Justice Gajendragadkar (as he then was)

was constituted to consider whether the Appellate Tribunal's decision should be restored or continued with modifications and to suggest further modifications having regard to the overall conditions of banks in general and individual banks in particular. In October, 1954 the Association, realising that delay was inevitable, agreed to accept the scales of pay on the basis of the modified Labour Appellate Tribunal's decision though the employees obtained by the agreement something more than their counterparts in the higher class commercial banks under the order of Government which modified the decision of the Labour Appellate Tribunal. The advantage to the Reserve Bank employees was neutralized when the Bank Award Commission restored the decision of the Labour Appellate Tribunal in respect of the Commercial Banks. The agreement lasted till 31st October, 1957 and the Reserve Bank employees honoured it.

On 11th July, 1959 the Association submitted a fresh charter of demands asking for a complete revision of the pay structure and invoked the norms settled at the Fifteenth Indian Labour Conference and asked for improvement generally in the conditions of service. As the Reserve Bank was not agreeable to negotiate, the Association called upon the Reserve Bank to ratify the Code of Conduct evolved at the Sixteenth Indian Labour Conference and to proceed to arbitration but the Reserve Bank declined. The Association served a notice of strike and threatened cessation of work from 25th March, 1960. Before this happened the All India State Bank of India Staff Federation had given a notice and there was a strike from 4th March, 1960 and on 19th March, all bank employees struck work in support and the several references to which we have referred followed.

The Reserve Bank during the years between 1946 and 1960 undertook from time to time revision of salaries and allowances. In 1947 and 1948 dearness allowances were revised and in 1948 there was a general revision of scales of pay as from 1st April, 1948. These revisions were made at the demand of the Association. In 1951 *ad hoc* increases in dearness allowances were made and compensatory allowances were introduced and from 1951 local allowances were paid to certain classes of employees serving at some of the important offices of the Reserve Bank and subsequently the scheme of local allowances was extended to a few other branches. In 1954 local allowances were converted into local pay and 25 per cent. of the dearness allowances was treated as pay for calculation of retiring benefits, etc. In 1957 family allowances to Class IV employees were raised and in 1958 and 1959 dearness allowances were again slightly raised. These increases, though welcome to them, hardly satisfied the demands of the employees. There were many conciliation conferences but none was successful. The cost of living index with base year 1949—100 had increased by 26 points in February, 1960 and the principles of minimum and fair wages were deliberated upon and adverted to in the Report of the 15th Indian Labour Conference. These principles, to which detailed reference will be made presently, were desired by the employees of the Reserve Bank to be put into operation. As a result the gap between the demands of the employees and the officers of the Reserve Bank, which was wide already, became wider still and conciliation which had always succeeded in the past, was not possible. The Association suggested arbitration but the Reserve Bank by its letter dated 11th February, 1960 did not agree. The Reserve Bank stated that it did not wish to get "seriously out of step" with Government or the Commercial Banks. The Reserve Bank referred to the Pay Commission Report and pointed out that the demands of the employees took no notice of the state of Indian economy. The Association, through its Secretary, in reply (22nd February, 1960) observed :

"Your criticism, that the Association's Charter of Demand has been pitched so high as to exclude all scope for satisfactory solution through negotiations we may point out, is baseless and incorrect, as the Charter has been based on the Norms set up by the 15th Tripartite Labour Conference at Nanital where the need-based wage formula for Indian worker was evolved, and the co-efficient for conversion to arrive at the minimum wage for a middle class salaried employee has been accepted from the Rajadhyaksha Report....."

The Association also pointed out that it has been conceded by the Governors of the Reserve Bank in the past that the emoluments of the Reserve Bank employees ought

to be higher than those of other Bank employees and, therefore, the recommendations of the Pay Commission were irrelevant. In this appeal one of the fundamental points argued is whether the National Tribunal was right in rejecting the demand for the inauguration of the need-based formula. It was, however, in this background that the National Industrial Tribunal was constituted and the whole of the dispute was referred to it.

This Reference embraced as many as 22 items in respect of Class II and Class III employees and 23 items in respect of Class IV employees. Some of these were decided in favour and some against the employees. Not much purpose would be served if we mentioned the many points of controversy or the decision on them, for in this appeal, the employees have stated their case with commendable restraint and Mr. Chari, though he argued it with his customary earnestness and ability, did so appreciating the realities of our national economy. He paid (it may be noted) sincere tributes to the Reserve Bank for its helpful attitude at all times, and expressed regret that there was no conciliation as on previous occasions. Mr. Palkhivala too, on behalf of the Reserve Bank, showed an awareness of the point of view of the employees and on some of the less important points, as we shall show later, agreed to consider the matter favourably.

The dispute now centres round two fundamental or major points and a few others not so fundamental. We shall deal with the main points first and then deal with the others. The first major point concerns employees of Class II. This class of employees was in the scales of pay which were settled by the agreement of 2nd November, 1954. These were :

1. Research Superintendents	Rs. 300-25-400-E.B.-25-650.
2. Superintendents and Sub-Accountants	Rs. 275-25-375-E.B.-25-500-25-650.
3. Deputy Treasurers (Bombay and Calcutta)	Rs. 450-25-650.
4. Deputy Treasurer (Gauhati)	Rs. 375-25-550.
5. Assistant Treasurers	Rs. 300-25-450.
6. Personal Assistant to the Governor	Rs. 320-30-650.
7. Personal Assistant	Rs. 325-25-550.
8. Caretakers, Grade I (Bombay and Calcutta)	Rs. 275-10-325-E.B.-12½-400.
9. Staff Assistants	Rs. 250-25-450-E.B.-25-650.
10. Supervisor, Premises Section	Rs. 250-15-310-E.B.-20-650.
11. Deputy Treasurer (Hyderabad)	Rs. 350-25-500.

There was in addition local pay for these employees equal to 10 per cent. of pay at Bombay, Calcutta, Ahmedabad, New Delhi, Madras and Kanpur. There was also a family allowance of Rs. 10 per child subject to a maximum of Rs. 30 for employees drawing less than Rs. 550 per month with a completed service of 5 years.

The National Tribunal in considering the demands of Class II staff of the Reserve Bank came to the conclusion that it could not give any award regarding these employees who were employed in a supervisory capacity. In this connection the Reserve Bank had pleaded that the Reference concerned only those employees who came within the definition of "workman" in the Industrial Disputes Act, 1947, as amended by the amended Act of 1956, and the Reserve Bank had contended that it was futile to fix a time scale for Class II staff because every incumbent in it was employed in a supervisory capacity and under the existing scales of pay every incumbent at a local pay centre would draw wages in excess of Rs. 500 after three years' service and every other incumbent at the end of 5 years' service and that most of the employees in that class had entered it by promotion and even at their entry were drawing wages in excess of Rs. 500. The Reserve Bank had further contended that a dispute could only be raised before the National Tribunal provided a workman continued to be a workman as defined. If the National Tribunal was asked to provide a scale of payment which would make the workman cease to be workman by

reason of the award, the Reserve Bank contended, the National Tribunal had no jurisdiction to make such an award and the Reference itself would become incompetent. The relationship of employer and workman, so it was contended, must exist (a) at the time of the dispute, (b) at the time of the award, and (c) during the currency of the award, otherwise the Reference and the consequent award would be without jurisdiction.

The Association had contended in reply (as it does in this appeal) that the duties performed by these employees were not of a supervisory nature and further that they were doing *supervisory work* and were not employed in a *supervisory capacity*. In Reference No. 1 of 1960, Mr. Sule, on behalf of the employees, had contended (a) that workmen could raise an industrial dispute for themselves and for a section of them at any level, (b) that persons who were workmen could raise an industrial dispute regarding their conditions of service not only at stages when they would be workmen but also at stages when they would cease to be workmen under the same employer and (c) that workmen could raise a dispute on behalf of non-workmen in the same establishment provided they had a direct and substantial interest in the dispute and had a community of interest with such non-workmen.

The National Tribunal in the present award adopted its discussion of the question in paragraphs 5.206 to 5.219 of the award in Reference No. 1 of 1960. It pointed out that the demand by Class II Supervisory Staff envisaged a scale commencing at Rs. 500 and that if the demand were considered favourably everyone in that class would cease to be a workman and such an award was beyond its jurisdiction to make. The National Tribunal held that even though by reason of community of interest other workmen might be entitled, having regard to the definition of "industrial dispute," to raise a dispute on behalf of others, they could not raise a dispute either for themselves or on behalf of others, when the dispute would involve consideration of matters in relation to non-workmen. The National Tribunal also held that it would even be beyond the jurisdiction of Central Government to refer such a dispute under the Industrial Disputes Act. The National Tribunal, therefore, held that the expression "scales of pay and methods of adjustment in the scales of pay" in Schedule I of the present Reference could not cover non-workmen such as supervisory staff in Class II. Those employed in supervisory capacity and drawing more than Rs. 500 p.m. were treated as not present before the National Tribunal and as they could not be heard the National Tribunal found it inexpedient to fix scales of salary affecting them. As regards those employed in the same capacity but drawing less than Rs. 500 per month but on scales carrying them beyond that mark, the National Tribunal thought that if all that it could do was to fix a scale up to Rs. 500, it would be unfair to lower the scale already fixed. The National Tribunal thus made no award in regard to supervisory staff in Class II.

Before we consider the case of the appellants an event which happened later may be mentioned. The Reserve Bank by a Resolution (No. 8) passed at their 1456th weekly meeting held on 24th April, 1963, increased the scale of pay, dearness allowances, house rent allowances, etc. for Class II staff with effect from 1st January, 1962, that is to say, the date from which the impugned award came into force. Under the Resolution scales of pay which were acknowledged by Mr. Chari, to be as generous as the present circumstances of our country permit, have been awarded. But more than this the minimum total emoluments as envisaged by the definition of wages, even at the commencement of service of each and every member of Class II staff on 1st January, 1962 now exceed Rs. 500 per month. This, of course, was done with a view to withdrawing the whole class from the ambit of the Reference, because, it is supposed, no member of the class can now come within the definition of "workman". We shall, of course, decide the question whether the Resolution has that effect. If it does, it certainly relieves us of the task of considering scales of pay for these employees for no remit is now possible as no National Tribunal is sitting. The scales having been accepted as generous, the dispute regarding scales of pay for Class II employees under the Reference, really ceases to be a live issue.

However, in view of the importance of the subject and the possibility of a recurrence of such question in other spheres, and the remarks of the National Tribunal as to jurisdiction of the Central Government and itself we have considered it necessary to go into some of the points mooted before us. Before we deal with them we shall read some of the pertinent definitions from the Industrial Disputes Act, 1947 :

"2. In this Act, unless there is anything repugnant in the subject or context,—

* * * * *

(k) "industrial dispute" means any dispute or difference between employers and employees or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the condition of labour of any person,

* * * * *

(rr) "wages" means all remuneration capable or being expressed in terms of money, which would, if the terms of employment, expressed or implied, were fulfilled, be payable to a workman in respect of his employment or of work done in such employment, and includes—

(i) such allowances (including dearness allowance) as the workman is for the time being entitled to ;

(ii) the value of any house accommodation, or of supply of light, water, medical attendance or other amenity or of any service or of any concessional supply of foodgrains or other articles ;

(iii) any travelling concession ;

but does not include—

(a) any bonus ;

(b) any contribution paid or payable by the employer to any pension fund or provident fund or for the benefit of the workman under any law for the time being in force ;

(c) any gratuity payable on the termination of his service.

(s) "workman" means any person (including an apprentice) employed in any industry to do any skilled or unskilled manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment be expressed or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person—

(i) who is subject to the Army Act, 1950, or the Air Force Act, 1950, or the Navy (Discipline) Act, 1934, or

(ii) who is employed in the police service or as an officer or other employee of a prison ; or

(iii) who is employed mainly in a managerial or administrative capacity ; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding five hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature."

Mr. Chari contends that the exclusion of Class II staff, is based on a wrong construction of the above definitions particularly the definition of 'workman', and a misunderstanding of the duties of Class II employees who have been wrongly classed as supervisors. He contends, alternatively that as Class II is filled by promotion from Class III, the question could and should have been gone into in view of the principle enunciated in the *Dimakuchi Tea Estate case*¹. Mr. Chari in support of his first argument points to the opening part of section 2 (s) where it speaks of "any skilled or unskilled manual, supervisory, technical or clerical work" and

contrasts it with the words of clause (iv) "being employed in a supervisory capacity" and submits that the difference in language is deliberate and is intended to distinguish *supervisory work* from plain *supervision*. According to him 'supervisory work' denotes that the person works and supervises at the same time, whereas 'supervisory capacity' denotes supervision but not work. Mr. Chari divides supervision into two kinds: (a) supervision which is a part of labour and (b) supervision which is akin to managerial functions though it is not actually so. He submits that this division is clearly brought out in the definition of 'workman' by the use of different expressions such as "work" and "capacity" for that a supervisor doing work enjoys the status of labour and a supervisor acting only in supervisory capacity enjoys the status of employer's agent at the lowest level.

In support of his contention Mr. Chari has referred to the amendment of the National Labour Relations Act of the United States of America (commonly known as the Wagner Act)¹, by the Labour Management Relations Act, 1947 (commonly known as the Taft-Hartley Act)² and the case of *The Packard Motor Co. v. The National Labour Relations Board*³ which preceded the amendment. The *Packard Motor Co. case*³ arose under the Wagner Act and the question was whether foremen were entitled as a class to the rights of self-organisation and collective bargaining under it. The benefits of the Wagner Act were conferred on employes which by section

(3) included 'any employee.' The Company, however, sought to limit this wide definition which made foremen employees both at common law and in common acceptance, with the aid of the definition of 'employer' in section 2 (2) which said that the word included "any person acting in the interest of an employer directly or indirectly.....". The Supreme Court of the United States in holding that foremen were entitled to the protection of the Wagner Act held by majority that even those who acted for the employer in some matters including dealing between the management and manual labour could have interests of their own when it came to fixation of wages, hours, seniority rights or working conditions. Mr. Chari suggests that the definition in the Industrial Disputes Act serves the same purpose when it makes a distinction between 'work' and 'capacity.'

This ruling, of course, cannot be used in this context though as we shall presently see it probably furnishes the historical background for the amendment in the United States and leads to the next limb of Mr. Chari's argument. The minority speaking through Mr. Justice Douglas, made the following observation which puts the *Packard Motor Co. case*³ out of consideration—

"Indeed, the problems of those in the supervisory categories of management did not seem to have been in the consciousness of the Congress..... There is no phrase in the entire Act which is description of those doing supervisory work".

In this state of affairs it is futile to refer to this ruling any further or to derive assistance from any of the two opinions which savours of a *a priori* deduction.

The *Packard Motor Co. case*³, was decided in March, 1947 and in the same year the Taft-Hartley Act was passed. Section 2 of the latter Act defined employer to include "any person acting as agent of an employer, directly or indirectly....." and the term employee was defined to exclude any individual employed as a superior. The term supervisor was defined to mean an individual

having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees or responsible to direct them or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

Mr. Chari suggests that the Industrial Disputes Act recognising the same difficulty, may be said to have adopted the same tests by making a distinction between

1. (1935) 49 Stat 449.
2. (1947) 61 Stat 156.

3. (1946) 91 L.Ed. 1040 : 330 U.S. 485.

'work' and 'capacity.' According to him, these tests provide for that twilight area where the operatives (to use a neutral term) seem to enjoy a dual capacity.

The argument is extremely ingenious and the simile interesting but it misses the realities of the amendment of the Industrial Disputes Act in 1956. The definition of 'workman' as it originally stood before the amendment in 1956 was as follows :—

"2 (s) 'workman' means any person employed (including an apprentice) in any industry to do any skilled or unskilled manual or clerical work for hire or reward and includes, for the purposes of any proceedings under this Act in relation to an industrial dispute, a workman discharged during that dispute, but does not include any person employed in naval, military or air service of the Government."

The amending Act of 1956 introduced among the categories of persons already mentioned persons employed to do supervisory and technical work. So far the language of the earlier enactment was used. When, however, exceptions were engrafted, that language was departed from in clause (iv) partly because the draftsman followed the language of clause (iii) and partly because from persons employed on supervision work some are to be excluded because they draw wages exceeding Rs. 500 per month and some because they function mainly in a managerial capacity or have duties of the same character. But the unity between the opening part of the definition and clause (iv) was expressly preserved by using the word 'such' twice in the opening part. The words, which bind the two parts, are not—"but does not include any person." They are—"but does not include any *such* person" showing clearly that what is being excluded is a person who answers the description "employed to do supervisory work" and he is to be excluded because being employed in a 'supervisory capacity' he draws wages exceeding Rs. 500 per month or exercises functions of a particular character.

The scheme of our Act is much simpler than that of the American statutes. No doubt like the Taft-Hartley Act the Amending Act of 1956 in our country was passed to equalise bargaining power and also to give the power of bargaining and invoking the Industrial Disputes Act to supervisory workmen, but it gave it only to some of the workmen employed on supervisory work. 'Workman' here includes an employee employed as supervisor. There are only two circumstances in which such a person ceases to be a workman. Such a person is not a workman if he draws wages in excess of Rs. 500 per month or if he performs managerial functions by reason of a power vested in him or by the nature of duties attached to his office. The person who ceases to be a workman is not a person who does not answer the description "employed to do supervisory work" but one who *does answer* that description. He goes out of the category of "workmen" on proof of the circumstances excluding him from the category.

By the revision of salaries in such a way that the minimum emoluments equal to wages (as defined in the Act) of Class II staff now exceed Rs. 500 per month, the Reserve Bank intends to exclude them from the category of workmen and to render the Industrial Disputes Act inapplicable to them. Mr. Palkhivala frankly admitted that this step was taken so that this group might be taken away from the vortex of industrial disputes. But this position obviously did not exist when the scale was such that some at least of Class II employees would have drawn wages below the mark. The Reference in those circumstances was a valid reference and the National Tribunal was not right in ignoring that class altogether. Further, the National Tribunal was not justified in holding that if at a future time an incumbent would draw wage in the time scale in excess of Rs. 500, the matter must be taken to be withdrawn from the jurisdiction of the Central Government to make a reference in respect of him and the National Tribunal to be ousted of the jurisdiction to decide the dispute if referred. Supervisory staff drawing less than Rs. 500 per month cannot be debarred from claiming that they should draw more than Rs. 500 presently or at some future stage in their service. They can only be deprived of the benefits if they are non-workmen at the time they seek the protection of the Industrial Disputes Act.

Mr. Chari next contends that considering the duties of Class II employees, it cannot be said that they are employed in a supervisory capacity at all and in elucidation of the meaning to be given to the words 'supervisory' and 'capacity' he has cited numerous dictionaries, Corpus Juris, etc. as to the meaning of the words "supervise", "supervisor", "supervising", "supervision", etc., etc. The word "supervise" and its derivatives are not words of precise import and must often be construed in the light of the context, for unless controlled, they cover an easily simple oversight and direction as manual work coupled with a power of inspection and superintendence of the manual work of others. It is, therefore, necessary to see the full context in which the words occur and the words of our own Act are the surest guide. Viewed in this manner we cannot overlook the import of the word "*such*" which expressly links the exception to the main part. Unless this was done it would have been possible to argue that clause (iv) indicated something, which, though not included in the main part, ought not by construction to be so included. By keeping the link it is clear to see that what is excluded is something which is already a part of the main provision.

In view of what we have held above it is hardly necessary to advert to the next argument that under the principle of the *Dimakuchi Tea Estate case*¹, workmen proper belonging to Classes II and III in this reference are entitled to raise a dispute in respect of employees in Class II who by reason of clause (iv) test have ceased to be workmen. The ruling of this Court in the above case lays down that when the workmen raise an industrial dispute against an employer, the person regarding whom the dispute is raised need not strictly be a 'workman' but may be one in whose terms of employment or conditions of labour the workmen raising the dispute have a direct and substantial interest. The definition of 'industrial dispute' in section 2 (k), which we have set out before, contemplates a dispute between :

- (a) employers and employers ; or
- (b) employers and workmen; or
- (c) workmen and workmen :

but it must be a dispute which is connected with the employment or non-employment or the terms of employment or with the conditions of labour of any person. The word 'person' has not been limited to 'workman' as such and must, therefore, receive a more general meaning. But it does not mean any person unconnected with the disputants in relation to whom the dispute is not of the kind described. It could not have been intended that though the dispute does not concern them in the least, workmen are entitled to fight it out on behalf of non-workmen. The National Tribunal extended this principle to the supervisors as a class relying on the following observations from the case of this Court :

"Can it be said that workmen as a class are directly or substantially interested in the employment non-employment, terms of employment or conditions of labour of persons who belong to the supervisory staff and are, under provisions of the Act, non-workmen on whom the Act has conferred no benefit, who cannot by themselves be parties to an industrial dispute and for whose representation the Act makes no particular provision ? We venture to think that the answer must be in the negative." It may, however, be said that if the dispute is regarding employment, non-employment, terms of employment or conditions of labour of non-workmen in which workmen are themselves vitally interested, the workmen may be able to raise an industrial dispute. Workmen can, for example, raise a dispute that a class of employees not within the definition of workman should be recruited by promotion from workmen. When they do so the workmen raise a dispute about the terms of their own employment though incidentally the terms of employment of those who are not workmen is involved. But workmen cannot take up a dispute in respect of a class of employees who are not workmen and in whose terms of employment those workmen have no direct interest of their own. What direct interest suffices is a question of fact but it must be a real and positive interest and not fanciful or remote. It follows, therefore, that the National Tribunal was in error in not considering the claims of Class II employees whether at the instance of members drawing less than Rs. 500

1. (1958) 1 L.L.J. 500 : (1958) S.C.J. 637 : (1958) S.C.R. 1156 : A.I.R. 1958 S.C. 353.

as wages or at the instance of those lower down in the scale of employment. The National Tribunal was also in error in thinking that scales of wages in excess of Rs. 500 per month at any stage were not within the jurisdiction of the Tribunal or that Government could not make a reference in such a contingency. We would have been required to consider the scales applicable to those in Class II but for the fact that the Reserve Bank has fixed scales which are admitted to be quite generous.

It may be mentioned here that Mr. Chari attempted to save the employees in Class II from the operation of the exceptions in clause (iv) by referring to their duties which he said were in no sense 'supervisory' but only clerical or of checkers. He also cited a number of cases, illustrative of this point of view. Those are cases dealing with foremen, technologists, engineers, chemists, shift engineers, Assistant Superintendents, Depot Superintendents, godown-keepers, etc. We have looked into all of them but do not find it necessary to refer to any except one. In *Ford Motor Company of India v. Ford Motors Staff Union*¹, the Labour Appellate Tribunal correctly pointed out that the question whether a particular workman is a supervisor within or without the definition of 'workman' is

"ultimately a question of fact, at best one of mixed fact and law....."

and
"will really depend upon the nature of the industry, the type of work in which he is engaged, the organisational set up of the particular unit of industry and like factor."

The Labour Appellate Tribunal pertinently gave the example that:

"the nature of the work in the banking industry is in many respects obviously different from the nature and type of work in a workshop department of an engineering or automobile concern."

We agree that we cannot use analogies to find out whether Class II workers here were supervisors or doing mere clerical work. No doubt, as Mr. Chari stated, the work in a Bank involves layer upon layer of checkers and checking is hardly supervision but where there is a power of assigning duties and distribution of work there is supervision. In *Llyods Bank, Ltd. v. Pannalal Gupta*², the finding of the Labour Appellate Tribunal was reversed because the legal inference from proved facts was wrongly drawn. It is pointed out there that before a clerk can claim a special allowance under paragraph 164 (b) of the Sastry Award open to Supervisors, he must prove that he supervises the work of some others who are in a sense below him. It is pointed out that mere checking of the work of others is not enough because this checking is a part of accounting and not of supervision and the work done in the audit department of a bank is not supervision.

The Reserve Bank has placed on record extracts from the manuals, orders, etc. relative to all Class II employees and on looking closely into these duties we cannot say that they are not of a supervisory character and are merely clerical or checking. These employees distribute work, detect faults, report for penalty, make arrangements for filling vacancies, to mention only a few of the duties which are supervisory and not merely clerical. Without discussing the matter too elaborately we may say that we are satisfied that employees in Class II except the Personal Assistants, were rightly classed by the National Tribunal as employed on supervisory and not on clerical or checking duties. In view of the fact that all of them now receive even at the start "wages" in excess of Rs. 500 per month, there is really no issue left concerning them, once we have held that they are working in a supervisory capacity.

The next fundamental point requires narration of a little history before it can be stated. In December, 1947 there was an Industries Conference with representatives of the Government of India and the Governments of the States, businessmen, industrialists and labour leaders. An Industrial Truce Resolution was passed unanimously which stated *inter alia* that increase in production was not possible unless there was just remuneration to capital (fair return), just remuneration

1. (1953) 2 L.L.J. 444.

(S.C.).

2. (1961) 1 L.L.J. 18; (1961) 2 Fac.L.R. 219

to labour (fair wages) and fair prices for the consumer. The Resolution was accepted by the Central Government. In 1947, a Central Advisory Council was appointed which in its turn set up a Committee to deliberate and report on fair wages for workmen. The Report of that Committee has been cited over and over again. In the *Standard Vacuum Refg., Co. v. Its Workmen*¹, this Court elaborately analysed the concept of wages as stated by the Committee. The Committee divided wages into three kinds: Living wage, fair wage and minimum wage. Minimum wage, as the name itself implies represents the level below which wage cannot be allowed to drop. It was universally recognised that a minimum wage must be prescribed to prevent the evil of sweating and for the benefit of workmen who were not in a position to bargain with their employers. This received immediate attention in India, though there was an International Convention as far back as 1928 and the demand for fixation of minimum wages extended even to non-sweated industries. The result was the Minimum Wages Act of 1948. The Fair Wages Committee understood the term minimum wage as the lowest wage in the scale below which the efficiency of the worker was likely to be impaired. It was described as the "wage floor" allowing living at a standard considered socially, medically and ethically to be the acceptable minimum. Fair wages by comparison were more generous and represented a wage which lay between the minimum wage and the living wage. The United Provinces Labour Enquiry Committee classified the levels of living as

- (i) poverty level.
- (ii) minimum subsistence level
- (iii) subsistence *plus* level, and
- (iv) comfort level.

The concept of fair wages involves a rate sufficiently high to enable the worker to provide

"a standard family with food, shelter, clothing, medical care and education of children appropriate to his status in life but not at a rate exceeding the wage earning capacity of the class of establishment concerned."

A fair wage thus is related to a fair workload and the earning capacity. The living wage concept is one or more steps higher than fair wage. It is customary to quote Mr. Justice Higgins of Australia who defined it as one appropriate for "the normal needs of average employee, regarded as a human being living in a civilized community." He explained himself by saying that the living wage must provide not merely for absolute essentials such as food, shelter and clothing but for "a condition of frugal comfort estimated by current human standards" including "provision for evil days, etc. with due regard for the special skill of the workman." It has now been generally accepted that living wage means that every male earner should be able to provide for his family not only the essentials but a fair measure of frugal comfort and an ability to provide for old age or evil days. Fair wage lies between the concept of minimum wage and the concept of living wage.

During the years wage determination has been done on industry-cum-region-basis and by comparing, where possible, the wage scales prevailing in other comparable concerns. The Constitution by Article 43 has laid down a directive principle :—

"The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunity"

It may thus be taken that our political aim is 'living wage' though in actual practice living wage has been an ideal which has eluded our efforts like an ever-receding horizon and will so remain for some time to come. Our general wage structure has at best reached the lower levels of fair wage though some employers are paying much higher wages than the general average.

1. (1961) 1 S.C.J. 582 : (1961) 3 S.C.R. 536 : (1961) 1 Lab.L.J. 227 : A.I.R. 1961 S.C. 895.

In July, 1957 the Fifteenth Indian Labour Conference met as a Tripartite Conference and one of the Resolutions adopted was :

"The recommendations of the Committee as adopted with certain modifications, are given below—

(1)

(2) With regard to the minimum wage fixation it was agreed that the minimum wage was 'need-based' and should ensure the minimum human needs of the industrial worker, irrespective of any other considerations. To calculate the minimum wage, the Committee accepted the following norms and recommended that they should guide all wage fixing authorities, including minimum wage committees, wage boards, adjudicators, etc. ;

(i) In calculating the minimum wage, the standard working class family should be taken to consist of 3 consumption units for one earner, the earnings of women, children and adolescents should be disregarded.

(ii) Minimum food requirements should be calculated on the basis of a net intake of 2,700 calories, as recommended by Dr. Aykroyd for an average Indian adult of moderate activity.

(iii) Clothing requirements should be estimated at a *per capita* consumption of 18 yards per annum which would give for the average worker's family of four, a total of 72 yards.

(iv) In respect of housing the norm should be the minimum rent charged by Government in any area for houses provided under the Subsidised Industrial Housing Scheme for low income groups.

(v) Fuel, lighting and other 'miscellaneous' items of expenditure should constitute 20 per cent. of the total minimum wage.

(3) While agreeing to these guide lines for fixation of the minimum wage for industrial workers throughout the country, the Committee recognised the existence of instances where difficulties might be experienced in implementing these recommendations. Wherever the minimum wage fixed went below the recommendations, it would be incumbent on the authorities concerned to justify the circumstances which prevented them from the adherence to the norms laid down.

* * * * *

The Association and the Union desire that the wage-floor should be the need-based minimum determined at the Tripartite Conference in the above Resolution and that the emoluments of the middle class staff should be determined with a proper co-efficient. They suggest a co-efficient of 120 per cent. in place of the 80 per cent. applied by the National Tribunal, to determine the wages of the middle class staff in relation to the wages of the working classes. In support of their case the employees first point to the Directive Principle above-quoted and add that the First Five Year Plan envisaged the restoration of "pre-war real wage as a first-step towards the living wage" through rationalisation and modernisation and recommended that

"the claims of labour should be dealt with liberally in proportion to the distance which the wages of different categories of workers have to cover before attaining the living wage standard."

The employees next refer to the Second Five Year Plan where it is stated :

Wages.—A wage policy which aims at a structure with rising real wages requires to be evolved. Workers' right to a fair wages has been recognised but in practice it has been found difficult to quantify it. In spite of their best efforts, industrial tribunals have been unable to evolve a consistent formula..... (page 578, para. 21).

The establishment of Wage Boards, the taking of a wage census and the improvement of marginal industries which operate as a 'drag' on better industries was suggested in that Plan. Finally, it is submitted that the Third Five Year Plan has summed up the position thus ; in paras. 20 and 21 at page 256 :

"20. The Government has assumed responsibility for securing a minimum wage for certain sections of workers, in industry and agriculture, who are commercially weak and stand in need of protection. Towards this end the Minimum Wages Act provides for the fixation and revision of wage rates in these occupations. These measures have not proved effective in many cases. For better implementation of the law, the machinery for inspection has to be strengthened

21. Some broad principles of wage determination have been laid down in the Report of the Fair Wages Committee. On the basis of agreement between the parties, the Indian Labour Conference had indicated the content of the need-based minimum wage for guidance in the settlement of wage disputes. This has been reviewed and it has been agreed that the nutritional requirements of a working class family may be re-examined in the light of the most authoritative scientific data on the subject

The Association and the Union contend that the National Tribunal ought to have accepted the Tripartite Resolution and determined the basic wage in accordance therewith.

The National Tribunal in adjudicating on this part of the case referred to the *Trown Aluminium Works v. Workmen*¹, where at page 6 this Court observes :—

"Though social and economic justice is the ultimate ideal of industrial adjudication, its immediate objective in an industrial dispute as to the wage structure is to settle the dispute by constituting such a wage structure as would do justice to the interests of both labour and capital, would establish harmony between them and lead to their genuine and wholehearted co-operation in the task of production In achieving this immediate objective, industrial adjudication takes into account several principles such as, for instance, the principle of comparable wages, productivity of the trade or industry, cost of living and ability of the industry to pay In deciding industrial disputes in regard to wage structure, one of the primary objectives is and has to be the restoration of peace and goodwill in the industry itself on a fair and just basis to be determined in the light of all relevant considerations"

The National Tribunal pointed out that the Planning Commission had set up an official group for study and as a result of the deliberations, the group decided to prepare notes on different aspects of wage so that they could be sent to wage fixing bodies. Four such notes were drawn up and were circulated to the 15th Indian Labour Conference and the 15th Indian Labour Conference deliberated on them and the Resolution on which reliance is placed by the employees was the result. The National Tribunal, while appreciating the importance of the Resolution, was not prepared to act on it pointing out that it was not binding but recommendatory, that Government did not accept it and that the Reserve Bank not being a party was not bound by it. There is no doubt that Government in answer to a query from the Pay Commission answered—

"..... The Government desire me to make it clear that the recommendations of the Labour Conference should not be regarded as decisions of Government and have not been formally ratified by the Central Government. They should be regarded as what they are, namely, the recommendations of the Indian Labour Conference which is tripartite in character. Government have, at no time, committed themselves to taking executive action to enforce the recommendations."

The National Tribunal, therefore did not consider itself bound in any way by what the Resolution said.

The National Tribunal then considered the Resolution on merits as applicable to the case in hand observing :

"For the first time in India, norms have been crystallised for the purposes of fixation of a need based minimum wage in a Conference where the participants were drawn from the ranks of Government, industry and labour. These recommendations represent a landmark in the struggle of labour for fixation of a minimum wage in accordance with the needs, for the workmen. The resolution lays down what a minimum wage should be. It recognises that the minimum wage was 'need-based'".

The National Tribunal however, could not accept the Resolution because the Resolution standardised norms applicable to all industrial workers whatever their age or the number of years of service or the nature of their employment. It felt that there was difficulty in accepting the basis of three consumption units at all stages of service or the net intake of 2,700 calories at all ages pointing out that this much food was what Dr. Aykroyd thought as proper to be consumed. The National Tribunal did not see the need for changing the co-efficient of 80 per cent. The National Tribunal held that in the economy of our country the need-based minimum suggested by the Resolution was merely an ideal to be achieved by slow stages but was impossible of achievement instantly.

We have been addressed able and very moving arguments on behalf of the employees by Mr. Chari. There can be no doubt that in our march towards a truly fair wage in the first instance and ultimately the living wage we must first achieve the need-based minimum. There is no doubt also that 3 consumption units formula is, if anything, on the low side. In determining family budgets so as to discover the workers' normal needs which the minimum wage regulations ought

1. (1958) S.C.J. 209 : (1958) S.C.R. 651 : A.I.R. 1958 S.C. 30.
(1958) M.L.J. (Cr.) 109 : (1958) 1 Lab.L.J. 1 :

to satisfy, the size of the standard family is very necessary to fix. One method to take simple statistical average of the family size and another is to take into account some other factors, such as,

(i) the frequency of variations in family sizes in certain regions and elements;

(ii) the number of wage earners available at different stages;

(iii) the increase or decrease in consumption at different stages in employment, that in the age structure and its bearing on consumption.

The plain averages laid down in the Resolution may have to be weighed in different regions and in different industries and reduced in others. It is from this point of view that the Reserve Bank has pointed out that though the consumption units are taken to be 2.25, the earning capacity after 8 years' service is sufficient to provide for 3 consumption units as required by the need base formula. The question is whether the National Tribunal is in error in accepting 2.25 consumption units instead of 3 as suggested in the Resolution.

In our judgment, the Tribunal was not wrong in accepting 2.25 consumption units. But it seems to us that if at the start the family is assumed to be 2.25, it is somewhat difficult to appreciate that the family would take 8 years to grow to 3 consumption units. We are aware that the Sastry Tribunal thought of 3 consumption units at the 10th year and the Sen Tribunal at the 8th year but we think it misses the realities of our national life. In our country it would not be wrong to assume that on an average 3 consumption units must be provided for by the end of 5 years' service. The consumption units in the first five years should be graduated. As things stand today, it is reasonable to think that 3 consumption units must be provided for by the end of five years' service, if not earlier.

The difficulty in this case in accepting the need-formula is very real. The Reserve Bank is quite right in pointing out that the minimum wage so fixed will be above *per capita* income in our country and that it is not possible to arrive at a constant figure in terms of money. According to the Association and the Union, the working class family wage works out to Rs. 165.9 (though the demand is reduced to Rs. 145 by the Association and Rs. 140 by the Union) while, according to the Reserve Bank to Rs. 107.75. The middle class wage, according to the Association will be Rs. 332.75 while, according to the Bank, Rs. 202. This is because emphasis is placed on different dietary components in the first case and the increased difference in the second case. Further the food requirements of 2,700 calories was considered by the Pay Commission to be too high and by the Planning Commission (Third Plan) to be a matter for re-examination. It will have to be examined what amount of food should make up the necessary calories and how many calories are the minimum. Further the amount of minimum wage calculated on the need-base formula was said by the Pay Commission to be extraordinarily high. This was also the finding of the Labour Appellate Tribunal in *East Asiatic Co. v. Workmen*¹. Both these documents contain valuable calculations and they show the enormous increase in wages which would certainly cause enormous unrest among workmen in general in the country. It is also to be noticed that the Reserve Bank, which Mr. C. B. Bhabha claims is the best employer, to apply the formula, is not really the right place for the experiment. If the experiment has to be performed it must have a beginning in a commercial concern after thorough examination and a very careful appraisal of the effect on the resources of the employer and on production. The Reserve Bank is not a profit-making commercial undertaking. Its surplus income is handed over to Government and becomes national income. Its main sources of income are discounting Treasury Bills and interest on sterling securities and rupee securities held against the note issue. Income from exchange on remittances, commercial banks, the management of public debt and interest on loans and advances to Banks and Governments is small. It would, therefore, appear that the Reserve Bank is not the proper place to determine what the need-based minimum wage should be.

ing it. It cannot also be overlooked that even without the formula it pays wages than elsewhere.

There is, however, much justification for the argument of Mr. Chari. The tripartite Conference was a very representative body and the Resolution was passed in the presence of representatives of Government and employers. There must be a proper value to the Resolution. The Resolution itself is not difficult to criticize. It was passed as indicating the first step towards achieving the living wage.

Unfortunately, we are constantly finding that basic wage, instead of moving to the subsistence plus level, tends to sag to poverty level when there is a rise in prices. To overcome this tendency our wage structure has for a long time been composed of two items (a) the basic wages, and (b) a dearness allowance which is altered to correspond, if not entirely, at least the greater part of the increased cost of living. This does not solve the problem of real wage. At the same time we have to beware that any upward movement of basic wage is likely to affect the cost of production and lead to fall in our exports and to the raising of prices all round. There is a vicious circle which can be broken by increased production and not by increasing wages. What we need is the introduction of production bonus, increased fringe benefits, medical, educational and insurance facilities. As a counterpart to this capital also be prepared to forego a part of its return. There is much to be said for applying the need-based formula in all its implications for it is bound to be our first step towards living wage. As in many other matters relating to industrial disputes the problem may, perhaps, be best tackled by agreement between Capital and labour in an establishment where a beginning can be safely made in this direction.

The next objection to the award is in respect of the co-efficient chosen by the award. The difference in the cost of living between the members of the clerical and the subordinate staff has been held to be an increase of 80 per cent over remuneration of the latter. This was laid down by the late Mr. Justice Bhakshu in a dispute between the Post and Telegraphs Department and its gazetted employees. Mr. Justice Rajadhyaksha's calculation was made thus :

In 1922-24 there was a middle class family budget enquiry in Bombay and it was found that a family consisting of 4.58 persons spends Rs. 138-5-0 per month. But the average expenditure of a middle class family in the lowest income group (having incomes between Rs. 75 and 125) per month was Rs. 103-4-0. In 1923 the cost of living Index figure was 155 whereas in 1938-39 it was 104.

Applying to these index numbers the cost of living of the same family would be $\frac{103 \times 104}{155} = \text{Rs. } 69$

In 1938-39. The lowest income group in the middle class budget enquiry consisted of 3.29 consumption units. Therefore for an average family of 3 consumption units, the expenditure required in 1938-

would have been $\frac{69 \times 3}{3.29} = \text{Rs. } 63$. According to the findings of the Rau Court of Enquiry a work-

ing class family consisting of 3 consumption units required Rs. 35 for minimum subsistence. It follows that the proportion of the relative cost of living of a working class family to that of a middle class family of 3 consumption unit is 35 : 63, i.e. the cost of living of a middle class family is about 80 per cent. higher than that of a working class family."

The family budget enquiry and the Rau Court of Inquiry were in 1922 and 1940 respectively. The award was in favour of reducing the co-efficient because some of the working classes had increased remarkably in most cities after 1939. The Labour Tribunal actually reduced it. The Central Pay Commission fixed the minimum pay of middle class employees as Rs. 90 as against the minimum pay of subordinate staff of Rs. 55, thus making the co-efficient 64 per cent. The Labour Tribunal restored the co-efficient to 80 per cent. The Association asked for a co-efficient of 120 per cent. but the Tribunal in its award in Reference No. 1 refused to accept it. The National Tribunal was in the advantageous position of knowing the views of employees of commercial Banks and comparing them with the co-efficient demanded here. Other Unions and Federations did not demand such a high co-efficient. The National Tribunal not having any data felt

helpless in the matter and preserved the co-efficient at 80 per cent. It observed as follows :—

"In the year of grace 1962 this Tribunal is in no better position than the earlier Tribunals who have dealt with the matter. The inherent infirmities in this co-efficient have been pointedly referred to before me. I am not at all certain whether I would be very much wiser by an enquiry which may be conducted at present. Expenditure is conditioned by the income received by the class of persons whose expenditure is being considered. By and large, over a period of time expenditure cannot exceed the income. The only pattern which such inquiry may reveal may be a pattern based on the income of the class of persons whose case is being considered."

This Court is in no better position than the National Tribunal to say what other co-efficient should be adopted. When fresh and comprehensive enquiries are conducted, the results would show whether the co-efficient should go up or down. With the rise of wages to higher levels among the working class the differential is bound to be lower and this is a matter for inquiry. Till then there is no alternative but to adhere to the co-efficient already established.

We shall now take up for consideration some minor points which were argued by Mr. Nargolkar. The first is a demand by the Association for a combined seniority list so that promotion may be based on that list and not upon the reports about the work of the employees. The National Tribunal dealt with it in Chapter XVII of its award. Regulations 28 and 29 of the Reserve Bank of India (Staff) Regulations, 1948 deal with seniority and promotion and provide :

"28. An employee confirmed in the Bank's service shall ordinarily rank for seniority in his grade according to his date of confirmation in the grade and an employee on probation according to the length of his probationary service."

"29. All appointments and promotions shall be made at the discretion of the Bank and notwithstanding his seniority in a grade no employee shall have a right to be appointed or promoted to any particular post or grade."

Promotion, it will therefore appear, is a matter of some discretion and seniority plays only a small part in it. This dispute is concerned with the internal management of the Bank and the National Tribunal was right in thinking that the item of the reference under which it arose gave little scope for giving directions to the Bank to change its Regulations. The National Tribunal, however, considered the question and made an observation which we reproduce here because we agree with it :

"..... I can only generally observe that it is desirable that wherever it is possible without detriment to the interests of the Bank and without affecting efficiency, to group employees in a particular category serving in different departments at one centre together for the purpose of being considered for promotion, a common seniority list of such employees should be maintained. The same would result in opening up equal avenues of promotion for a large number of employees and there would be lesser sense of frustration and greater peace of mind among the employees."

Seniority and merits should ordinarily both have a part in promotion to higher ranks and seniority and merit should temper each other. We do not think that seniority is likely to be completely lost sight of under the Regulations and Mr. Palkhivala assured us that this is not the case.

Mr. Hathi next raised the question of seniority between clerks and typists but we did not allow him to argue this point as no question of principle of a general nature was involved. The duties of clerks and typists have been considered by the National Tribunal and its decision must be taken as final.

The next point urged was about gratuity. In the Statement of The Case the Association and the Union had made numerous demands in regard to gratuity but it appears from paragraphs 7.10 of the Award that the dispute was confined to the power to withhold payment of gratuity on dismissal. Rule 5 (1) of the Reserve Bank of India (Payment of Gratuity to Employees) Rules, 1947, provides as follows:

"5. (1) No gratuity will be granted to or in the case of an employee—

(a) if he has not completed service in the Bank for a minimum period of 10 years, or

(b) if he is or has been dismissed from service in the Bank for any misconduct."

The Association and the Union demanded modification of sub-rule (b) quoted above. The Sastry Tribunal had recommended that there should be no forfeiture of gratuity.

on dismissal except to the extent to which the mis conduct of the worker had caused loss to the establishment. The Labour Appellate Tribunal modified the Sasyry Award and decided in favour of full forfeiture of gratuity on dismissal. The Reserve Bank relied on the *Express Newspapers (Private) Ltd. and another v. Union of India and others*¹, in support of the sub-rule and also contended that there was no jurisdiction in the National Tribunal to consider this subject under item 20 of Schedule I or item 21 of Schedule II. The Reserve Bank relied upon item 7 of Schedule I and item 6 of Schedule II. The demand of the Association and the Union was rejected by the National Tribunal. It had earlier rejected as similar demand in connection with the commercial banks. The Reserve Bank did not, however, pursue the argument before us perhaps in view of the later decisions of this Court reported in the *Garment Cleaning Works v. Its Workmen*², *Greaves Cotton Co., Ltd. and others v. Their Workmen*³, and *Burhanpur Tapti Mills Ltd. v. Burhanpur Tapti Mills Mazdoor Sangh*⁴. In these cases it was held by this Court that gratuity is not a gift but is earned and forfeiture except to recoup a loss occasioned to the establishment, is not justified. Mr. Palkhivala undertook to get the rules brought in line with the decisions of this Court.

The next demand was with regard to pensions. In the Reserve Bank there are only two retiring benefits, namely, provident fund and gratuity. There is no scheme for pensions. It appears, however that a few employees from the former Imperial Bank, who are employed with the State Bank, enjoy all the three benefits. The demand, therefore, was that the Reserve Bank should provide for all the three benefits, namely, provident fund, gratuity and pension. The Reserve Bank contended that the National Tribunal had no jurisdiction under the Reference to create a scheme of pensions for the employees. The National Tribunal did not consider the question of jurisdiction because it rejected the demand itself. In the statement of the case filed by the Association this decision is challenged on numerous grounds. The ground urged before us is that the National Tribunal failed to exercise jurisdiction in respect of this demand and indirectly declined jurisdiction by rejecting the demand itself. The National Tribunal came to the conclusion that two retirement benefits were sufficient and it is difficult for us to consider this without re-opening the question on merits of the demand and re-examining the viewpoint of the Reserve Bank. We stated, therefore, at the hearing that we were not inclined to enter into such a large question not of principle but of facts.

The next demand was with regard to the confirmation of temporary employees. The Association had filed a number of Exhibits (Nos. S. 71, S. 72, S. 109 to S. 112) and the Union (R. 45 to R. 47) to show that a very large proportion of employees were borne as temporary employees and that it took a very long time for confirmation of temporary servants. The Bank in reply filed Schedules (T. 67 to T. 69 and T. 112 to T. 125). The question of confirmation and the period of probation are matters of internal management and no hard and fast rules can be laid down. It is easy to seek from the rival schedules that probationary periods are both short and long. As no question of principle is involved we decline to interfere and we think that the National Tribunal was also justified in not giving an Award of a general nature on this point.

The next point is about the extra payment which the graduates were receiving and the fitment of persons in receipt of such extra amounts in the new scale provided. In the year 1946 the Bank accepted the principle of giving an allowance to employees who acquired degrees while in employment. At the time of the present disputes graduates were in receipt of Rs. 10 as special pay. The question was whether in making fitment in the new time scales these amounts should have been treated as advance increments. It appears that the National Tribunal reached different conclusions in the two awards arising from Reference No. 1 and the present Reference. In the case of Commercial Banks the fitment was on a different principle and

1. (1958) S.C.J. 1113 : (1959) S.C.R. 12 : 673.

(1961) 1 L.L.J. 339 : A.I.R. 1958 S.C. 578.

2. (1962) 1 S.C.R. 711 : A.I.R. 1962 S.C.

3. (1964) 1 L.L.J. 342 : A.I.R. 1964 S.C. 689.

4. (1965) 2 S.C.J. 737 : A.I.R. 1965 S.C. 839.

Mr. Palkhivala agreed to make fitment in the new scale taking into account this special *ad hoc* pay as advance increment.

The next demand made by both the Association and the Union was that they should be allowed to participate and represent workers in disputes between an individual workman and the Reserve Bank. The Tribunal did not accept this contention for the very good reason that if Unions intervene in every industrial dispute between an individual workman and the establishment the internal administration would become impossible. In our judgment, this demand cannot be allowed.

The last contention is with regard to the time from which the award should operate. The stand-still agreement reached in 1954 expired in October, 1957 and the demand was that the award should come into force from 1st November, 1957 or at least from 21st March, 1960, the date of the reference. The National Tribunal has made its award to operate from 1st January, 1962. The Reserve Bank strongly opposes this demand. According to the Reserve Bank the Tribunal acted more than generously and gave more to the employees than they deserved. The Reserve Bank submits that the employees had made exorbitant demands and wasted time over interim award and, therefore, they cannot claim to have the award operate from the date of the reference much less from 1st November, 1957. The Reserve Bank relies upon the *Lipton's case*¹ and also contends that the Tribunal's decision is discretionary and this Court should not interfere with such a decision. Reliance is placed in this connection on *Remington Rand's case*², *Rajkamal Kalamandir (P.) Ltd. v. Indian Motion Pictures Employees' Union and others*³ and *Western Indian Match Company Ltd. v. Their Workmen*⁴. In reply the Association contends that the demand was not at all extravagant or exorbitant because it was based upon the Resolution of the 15th Indian Labour Conference and the Reserve Bank itself was guilty of delay after 1957 inasmuch as it asked that the report of the Pay Commission should be awaited.

The solution of this dispute depends upon the provisions of section 17-A of the Industrial Disputes Act, 1947. That section reads as follows :

"17-A. Commencement of the award—(1) An award (including an arbitration award) shall become enforceable on the expiry of thirty days from the date of its publication under section 17:

Provided that—

(a) *

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(b) if the Central Government is of opinion, in any case where the award has been given by a National Tribunal,

that it will be expedient on public grounds affecting national economy or social justice to give effect to the whole or any part of the award, the appropriate Government, or as the case may be, the Central Government may, by notification in the Official Gazette, declare that the award shall not become enforceable on the expiry of the said period of thirty days.

(2) Where any declaration has been made in relation to an award under the proviso to sub-section (1), the appropriate Government or the Central Government may, within ninety days from the date of publication of the award under section 17, make an order rejecting or modifying the award, and shall, on the first available opportunity, lay the award together with a copy of the order before the Legislature of the State, if the order has been made by a State Government, or before Parliament, if the order has been made by the Central Government.

(3) Where any award as rejected or modified by an order made under sub-section (2) is laid before the Legislature of a State or before Parliament, such award shall become enforceable on the expiry of fifteen days from the date on which it is so laid ; and where no order under sub-section (2) is made in pursuance of a declaration under the proviso to sub-section (1), the award shall become enforceable on the expiry of the period of ninety days referred to in sub-section (2).

(4) Subject to the provisions of sub-section (1) and sub-section (3) regarding the enforceability of an award, the award shall come into operation with effect from such date as may be specified therein,

1. (1959) 1 L.L.J. 431 : (1959) M.L.J. (Cri.) 511 : (1959) 2 S.C.R. (Sup.) 150 : (1959) S.C.J. 772 : A.I.R. 1959 S.C. 676.
2. (1962) 1 L.L.J. 287 : (1962) 4 Fac.L.R. 508 (S.C.).

3. (1963) 1 L.L.J. 318 : (1965) 2 S.C.W.R. 233.

4. (1963) 2 L.L.J. 459 : (1964) 3 S.C.R. 560 : (1965) 1 S.C.J. 141 : A.I.R. 1964 S.C. 472.

but where no date is so specified, it shall come into operation on the date when the award becomes enforceable under sub-section (1) or sub-section (3), as the case may be."

Ordinarily, an award comes into operation from the time stated in sub-section (1). The Tribunal, however, is given the power to order that its award shall be applicable from another date. The Tribunal stated that the date from which the award should come into operation was not a term of reference and the Reserve Bank had also contended that there was no specific demand for retrospective operation of the award. In *Wenger & Co. and others v. Their Workmen*¹, it was explained that retrospective operation implies the operation of the award from a date prior to the reference and the word 'retrospective' cannot apply to the period between the date of the reference and the award. There was no claim as such that the award should operate from 1st November, 1957 and the demand cannot be considered in the absence of any reference to the National Tribunal. The question, however, is whether a date earlier than 1st January, 1962 but not earlier than 21st March, 1960 should be chosen. Sub-section (4) quoted above gives a discretion to the Tribunal and this Court in dealing with that discretion observed in the *Hindustan Times Ltd. v. Their Workmen*², that no general principle was either possible or desirable to be stated in relation to the fixation of the date from which the award should operate. The Tribunal in fixing a date earlier than that envisaged by the first sub-section justified itself by stating that much of its time in the beginning was occupied by Reference No. 1 and a significant amount thereafter was occupied by Reference No. 3 and there was justification in making the award operate from 1st January, 1962. From the way in which the Tribunal expressed itself in this award and in the award in Reference No. 1 it appears that but for the delay that took place the Tribunal would have made the award to operate as laid down in sub-section (1). It has been ruled in the three cases—*Remington Rand's case*³, *Rajkamal's case*⁴, and *Western India Match Company's case*⁵—that a discretion exercised on judicial principles by the Tribunal about the commencement of the award should not be interfered with. Nothing was shown to us why the award should be made to commence earlier. Both sides were to blame in regard to the time taken up and the Tribunal perhaps found it difficult to reach a conclusion earlier in view of the number of the references before it. In the circumstances, it cannot be said that the selection of 1st January, 1962, when the inquiry in the present reference was completed, except the preparation of the award, was bad. In any event, this was a matter of discretion and it cannot be said that the discretion has not been exercised on judicial principles. We decline to interfere.

In the result the appeal fails and it will be dismissed. It may, however, be said that the appeal would have partly succeeded but for the creation of new scales of pay for Class II employees and acceptance of some of the minor points by the Reserve Bank. In this view of the matter we make no order about costs.

V. K.

Appeal dismissed.

1. (1963) 2 L.L.J. 403 : (1963) 2 S.C.R. 233.
(Supp.) 862 : A.I.R. 1964 S.C. 864.
2. (1963) 1 Lab.L.J. 108 : (1964) 1 S.C.R. 5.
234 : (1964) 2 S.C.J. 1 : A.I.R. 1963 S.C. 1332. 560 : (1963) 2 Lab.L.J. 459 : A.I.R. 1964 S.C. 472.
3. (1962) 1 L.L.J. 287 : (1962) 4 Fac. L.R. 508.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, Chief Justice, K. N. WANCHOO,
M. HIDAYATULLAH AND V. RAMASWAMI, JJ.

Ahmedabad Millowners' Association etc.

.. Appellants*

v.

The Textile Labour Association

.. Respondents.

1. The State of Gujarat,
2. All India Organisation of Industrial Employers,
3. All India Manufacturers' Organisation,
4. The Indian National Trade Union Congress,
5. Millowners' Association, Bombay,
6. Saurashtra Millowners' Association, and
7. Hind Mazdoor Sabha.

.. Interveners.

Bombay Industrial Relations Act (XI of 1947), sections 42 and 73—Scope of—Award subsisting—No notice of change given by either party—Reference to Industrial Court by the Government—Maintainability—Consumers price Index number—Changes made by Government—Employer paying under the old scheme—Industrial dispute.

Where the Government of Gujarat, accepting the report of an Expert Committee, ordered that 19 points be added to the State Index numbers and subsequently raised the linking factor to 3.17 from 2.98, and ceased publishing the cost of living index number of its 1926-27 numbers from January, 1964 and thereby made it impossible for the appellant-association to comply with the terms of existing award, the appellant-association advised its members to pay dearness allowance, for the month of March 1964 and subsequent months calculated on the basis of the last published index number for December, 1963 in the State's 1926-27 series. The respondents (Textile Labour Association) requested the members of the appellant-association to pay Dearness Allowance to their employees according to the converted number published by Government which had no sympathetic response. The Government referred the dispute to the Industrial Court of Gujarat under section 73 of the Act.

This appeal is against the decision of the Industrial Court.

The contentions of the appellant are : (1) the reference is not competent, (2) the new sample survey for the Index number suffered from two infirmities: (a) inadequacy of the sample size and (b) the impropriety of the mode of interviews ; (3) the linking factor at 3.17 upheld by the Industrial Court is not proper ; and (4) the appellant's lack of financial capacity to meet the additional burden must be accepted as the members had to carry on by borrowings.

Held, the scheme of section 42 read along with the other provisions in Chapter VIII clearly shows that the said Chapter can have no application to cases where the Government itself wants to make a reference.

The opening words of section 73 unambiguously declare that the power of the Government to make a reference will not be controlled by any other provisions of the Act.

The definition of " industrial dispute " in section 3 (17) of the Act is so wide and comprehensive as to include any dispute or difference between the employers and employees etc., that even where there is an existing award binding on the parties but there arises a difference between them, it is not easy to hold that the said difference does not amount to an industrial dispute for the purpose of section 73 merely because notice of change has not been given by either the employer or the employee under section 42.

It is true that the power conferred on the State Government by section 73 is not absolute or unqualified. It can be exercised only if one or other of the conditions (1), (2) or (3) of the section is satisfied.

In the instant case the Government was satisfied that the dispute was not ' likely to be settled by other means ' [section 73 (2)].

The index number does not purport to measure the absolute level of prices but intended to show over a period of time the average percentage change in the prices paid by the consumers belonging to the population group proposed to be covered by the index, for a fixed list of goods and services consumed.

ed by them. The average percentage change, measured by the index is calculated month after month with reference to a fixed period known as the base period of the index.

(The mode of arriving at the index numbers, pointed out.)

It seems reasonable to hold that if the quality of investigation has improved, and the method of working out the sample survey has made very great progress, then it would not be correct to say that because the size of the sample in the present case was smaller as compared to the size of the sample taken in 1926-27, the inadequacy of the size on the subsequent occasion introduces an infirmity in the investigation itself. That is the view which the Industrial Court has taken, and there is no reason to differ from it.

Expert opinion seems to suggest that if the interview method is properly adopted, it gives better results than the alternative method of account-books. Therefore, the Industrial Court was right in rejecting the appellants' contention that the impugned survey and the index constructed as a result of it, suffer from the infirmity that investigation was conducted in this survey by the interview method.

On the problem of the linking factor, one of the courses open is to link the State series with the new series to maintain continuity and this has been adopted by the Government of Gujarat and the Industrial Court has approved of the same. Otherwise one has to work out an entirely new scale of wages founded on the cost of living index for 1900 as the base year of the new series and to award Dearness Allowance thereafter. This would create a large number of problems and may lead to destroy industrial peace. The Industrial Court thought it would also be outside the scope of reference. The conclusion of the Industrial Court is not erroneous and is accepted.

(The problem is a technical problem to be dealt with by experts on examining all the aspects pertaining to the problem, and on the material as it stands it would be unreasonable, inexpedient and in fact impossible for this Court to attempt to resolve on the basis of the larger issue of law raised by the appellant).

It is true that the wages paid by the members of the appellant-association cannot be regarded as subsistence or mere minimum wages; it would not be open to the respondent to contend that they must pay the same whether they can afford to pay or not. If it is shown that the appellants cannot bear the burden and the implementation of the award would inevitably have an extremely prejudicial effect upon the continued existence of the industry itself, the question of revising wages and Dearness Allowance can be raised.

(Points to be considered on this question discussed.)

On the broad picture emerging from the evidence it is difficult to share the pessimism of the appellant. The Industrial Court has made a definite finding that it does not think that the financial condition of the industry has deteriorated so as to justify a departure from the principles in regard to dearness allowance hitherto laid down in respect of the industry at this Centre. That conclusion is well-founded and is not to be interfered with. The heavy bearing of the textile industry on borrowings, in the instant case, may be partly due to the fact that it has been under-capitalised and this state of borrowings had continued all along these hundred years of its flourishing existence.

Appeals by Special Leave from the Award dated the 26th October, 1964 of the Industrial Court, Gujarat in Reference (I.C.) No. 67 of 1964.

M. C. Setalvad, Senior Advocate (*R. J. Kolah* and *I. M. Nanavati*, Advocates, and *J. B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him), for Appellant (in C.A. No. 167 of 1965).

R. J. Kolah and *I. M. Nanavati*, Advocates, and *J. B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, Advocates, of *M/s. J. B. Dadachanji & Co.* for Appellants (in C.As. Nos. 168 and 170 of 1965).

N. A. Palkhivala, Senior Advocate (*I. M. Nanavati*, Advocate, and *J. B. Dadachanji*, *O. C. Mathur*, *Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him) for Appellants (in C. As. Nos. 169 and 173 of 1965).

I. M. Nanavati, Advocate, and *J. B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, for Appellants (in C.As. Nos. 171 and 172 of 1965).

J. B. Dadachanji, *O. C. Mathur* and *Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, for Appellants (in C.As. Nos. 537 and 538 of 1965).

S. R. Vasavada, *N. M. Barot*, *N. H. Shaikh*, *R. M. Shukla*, *A. N. Buch* and *D. T. Trivedi*, for Respondents.

C. K. Daphlary, Attorney-General for India (*K. L. Haithi* and *B. R. G. K. Achar*, Advocates, with him), for Intervener No. 1.

G. B. Pai, Advocate and *J. B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, for Intervener No. 2.

G. Ramanujam, Secretary, I.N.T.U.C. for Intervener No. 4.

B. Narayanaswami, Advocate, and *J. B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, Advocates of *J. B. Dadachanji & Co.*, for Intervener No. 5.

I. M. Nanavati, Advocate and *J. B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.* for Intervener No. 6.

H. K. Sowani and *K. R. Chaudhuri*, Advocates, for Intervener No. 7.

The Judgment of the Court was delivered by

Gajendragadkar, C.J.—This is a group of seven appeals which arise from an industrial dispute between the appellants, the Ahmedabad Mill Owners' Association, Ahmedabad, and 67 employers on the one hand, and the respondent, the Textile Labour Association, Ahmedabad, on the other. This dispute was referred by the Government of Gujarat to the Industrial Court, Gujarat, under section 73 of the Bombay Industrial Relations Act, 1946 (XI of 1947), (hereinafter called 'the Act'). In making the order of reference, the Government stated that it was satisfied that the industrial dispute in question was not likely to be settled by other means. The dispute itself consisted of three questions. These questions have been thus stated in the reference :

"(1) Whether under the award of the Industrial Court, Bombay dated the 2nd March, 1950, in Reference (I.C.) No. 189 of 1949 (as subsequently modified) read with award of the Industrial Court dated the 27th April, 1948, in Revision Petition No. Misc. 1 of 1947, the Ahmedabad Millowners' Association and the employers mentioned in the Annexure are bound to pay dearness allowance to their employees on the Consumer Price Index Numbers for working class for Ahmedabad published by the State Government since February, 1964, by using the index numbers in the series for Ahmedabad compiled by the Labour Bureau, Simla, and the linking factor of 3.17 adopted for linking that series to the State series with the old base ;

(2) If not, whether the said Ahmedabad Millowners' Association and the employers mentioned in the Annexure should pay dearness allowance to their employees for March 1964 and subsequent months in terms of the aforesaid awards, by treating the index numbers for working class for Ahmedabad published by the State Government since February, 1964, as the index numbers in the State series compiled on the basis of the family budget survey made in 1926-27 ;

(3) If not, how the dearness allowance to the aforesaid employees for March, 1964 and onwards should be paid on the index numbers for Ahmedabad published by the State Government since February, 1964."

The Industrial Court has answered the first question in favour of the appellants, whereas the two remaining questions have been answered in favour of the respondent. In the result, the appellants have been directed to pay dearness allowance to their employees for the month of March, 1964 and for subsequent months on the consumer price index numbers for working class for Ahmedabad published by the State Government since February, 1964, (by using the index numbers in the series for Ahmedabad compiled by the Labour Bureau, Simla, and the linking factor of 3.17 adopted for linking that series to the State series with the old base) at the rate of 2.84 pies per day for rise of each point in the cost of living index number over the pre-war figure 73. The Industrial Court has further directed that as per the award in Miscellaneous Application (IC-G) No. 1 of 1960, 75 per cent. of the average dearness allowance of the first six months of 1959, i.e., Rs. 63-15-9 per month of 26 working days, shall be consolidated with the basic wage and the difference between the dearness allowance as worked out as indicated and the said sum of Rs. 63-15-9 shall be continued to be paid as dearness allowance. The other terms and conditions in regard to payment of wages, including the dearness allowance, shall continue as under the existing award. The Industrial Court has made it clear that these directions should be given effect to from 1st of January, 1965 and the difference between what is paid and what has become payable under the present award shall be paid on or before 30th April, 1965. It appears that before the Industrial Court an agreement had been reached between the Fine Knitting Co. Ltd. of Ahmedabad and the Textile Labour Association, and the award has, therefore, provided that the directions issued by it shall apply only to the spin-

ning department of the Fine Knitting Co. and not to the hosiery department. It is against this award that the appellants have come to this Court by Special Leave. On 5th January, 1965, while granting Special Leave to the appellants, this Court directed that the Statements of The Case should be dispensed with and the appeals be listed for hearing in the week commencing 8th March, 1965. That is how these appeals have now come for final disposal before us.

Before dealing with the points raised by the appellants in these appeals, it is necessary, to set out somewhat, elaborately the previous history of the present dispute. The story about the payment of dearness allowance to textile industrial employees at Ahmedabad takes us back to the time when the Second World War broke out in September, 1939. As is well-known, as a result of the said War, the cost of living shot up; and in consequence, the industrial employees at Ahmedabad who had organised themselves as the Textile Labour Association, Ahmedabad, raised a demand for payment of dearness allowance. This demand became the subject-matter of arbitration by the Industrial Court at Bombay (Case No. 1 of 1940). The Industrial Court had to consider, *inter alia*, two major questions; the first was as to what was the extent of the rise in the cost of living consequent upon the Second World War; and the second was as to the extent and manner in which the said rise in the cost of living should be neutralised by the payment of dearness allowance. The Industrial Court examined the matter at great length and came to the conclusion that for the purpose of determining the quantum of dearness allowance to be paid to the employees, it would be reasonable to rely on the working class budget inquiry which had been conducted by the Government of Bombay between August, 1926 and July, 1927. Another similar inquiry had been conducted by the same Government in 1933-35, but the Industrial Court preferred to base its conclusions on the first inquiry. On the basis of the cost of living index taken as 100 for the base year 1926-27, the index for August, 1939 which stood at 73 was accepted as datum index, so that the rise in cost of living over the datum index of 73 had to be neutralised by payment of dearness allowance to the employees.

Having reached this conclusion on the first question, the Industrial Court examined the problem as to the extent and method by which the rise in the cost of living should be neutralised. On this question, its conclusion was that for 11 points rise (which is equivalent to a rise of 15 per cent) in the cost of living for the month of December, a cash relief to the extent of 10 per cent of the average wage, i.e., Rs. 3-8-0 per employee, should be awarded for the month of December and a similar relief proportionately determined should be awarded for other months. It was urged before the Industrial Court that relief could be granted to the employees in kind rather than in cash; but this contention was negatived by the Court, though it expressed a hope that the employers should start cost price grain shops at convenient centres for the benefit of the employees. That, in substance, is the result of the proceedings in Case No. 1 of 1940. It is with the decision of this dispute that the story about the payment of dearness allowance under an award began in Ahmedabad in respect of textile labour. It appears that as a result of this award, 66 2/3 per cent. neutralisation was allowed.

This award continued to be in operation till September, 1941. On 12th August, 1941, an agreement was entered into between the appellants and the respondent by which it was resolved that the dearness allowance to be paid to the employees in the member Mills of the appellant Association be raised by 45 per cent from the month of July, 1941, and in accordance with this agreement, an award was made by the Industrial Court on 15th September, 1941. As a result of this award, neutralisation came to be effected to the extent of 96 per cent on the average wage over the pre-war cost of living index of 73 in August, 1939, and to that extent the respondent gained. We have already noticed that the neutralisation which was effected by the earlier award was 66 2/3 per cent.

Two years thereafter, the appellant Association filed a petition (No. 1 of 1943) for a substantial reduction in the quantum of dearness allowance. It urged that in the year 1943, the textile industry at Ahmedabad had suffered considerable loss in its profits, and so, it was necessary that the dearness allowance fixed by the consent award should be reduced. When the matter was considered by the

Industrial Court, it was discovered that the claim made by the appellant Association was not substantiated by sufficient or satisfactory data in the form of published balance-sheets for the year 1943. The Industrial Court, therefore, refused to interfere with the award, but permitted the appellant Association to raise the same dispute in April, 1944 if it thought necessary to do so. No such application was, however, made by the appellant Association in 1944, with the result that the consent award passed on 15th September, 1941, continued to be in operation.

The said consent award had provided that the member mills were to pay the dearness allowance prescribed by it till the termination of the Second World War; and so, as soon as the war came to an end, the member mills stopped the payment of dearness allowance with effect from 8th May, 1945. The respondent then filed Petition No. 1 of 1945 before the Industrial Court asking for a direction against the appellant Association for payment of the dearness allowance on the same scale as was then prevailing for three months after 8th May, 1945. This prayer was granted by the Industrial Court. That is how matters stood as a result of the order passed on Petition No. 1 of 1945.

Meanwhile, the respondent gave a notice of change on 20th May, 1945, and demanded continuance of the payment of dearness allowance until the working class cost of living index for Ahmedabad stood above 73. It suggested that the quantum of dearness allowance should be related to the cost of living index as awarded by the Industrial Court Award dated the 26th April, 1940, and revised by the subsequent Award dated the 15th September, 1941. While making this demand, the respondent made it clear that this demand was made without prejudice to the claim of the employees for a revision in the entire wage structure. It appears that during the course of these proceedings, it was urged before the Industrial Court that the rise in the cost of living should be computed not with reference to the index figure of 73 in August, 1939, but with reference to the figure of 100 in 1926-27. This contention was, however, rejected by the Industrial Court. By its award, the Industrial Court directed that neutralisation should be effected to the extent of 76 per cent. As a result of this decision, the Court awarded Rs. 4 for 11 points rise in the cost of living index.

In 1946, the respondent moved for the revision of the said award (Revision Petition No. 1 of 1946). By this Revision Petition, the respondent claimed that the rise in the cost of living should be neutralised fully instead of 76 per cent. and this claim was based on the allegation that the profits of the textile industry had maintained a high level and the reduction in the extent of neutralisation from 96 per cent to 76 per cent. in the award of the previous year had adversely affected the employees and they had in fact begun to leave the industry. It may be pointed out that on all these occasions, the appellant Association urged before the Industrial Court that the average monthly income and expenditure of the textile employees in Ahmedabad left surplus with them and the need for neutralising the rise in the cost of living was not as much as was sought to be made out by the respondent. This contention has, however, been consistently rejected by the Industrial Court. Even so, the claim made by the respondent for increasing the extent of neutralisation was rejected by the Industrial Court, liberty being reserved to both the parties to approach the Court with a request for continuance or revision of the allowance at the end of seven months.

As soon as seven months expired, the respondent filed a (Revision Petition No. 1 of 1947) before the Industrial Court on 8th March, 1947. By this petition, the respondent renewed its claim for an increase in the dearness allowance. Meanwhile, the minimum wage for textile employees in Bombay had been fixed at Rs. 30 and dearness allowance was awarded to them with the object of neutralising the rise in the cost of living to the extent of 90 per cent on the minimum wage of Rs. 30. Taking advantage of the fact that the minimum wage for textile employees in Bombay had been fixed at Rs. 30, the appellant Association urged that there was no occasion to increase the rate of dearness allowance because the wages of the employees had already been increased under the standardization scheme which had been adopted in Ahmedabad. Alternatively, the appellant Association contended that if the Court was inclined to revise the dearness allowance, it should follow the same formula

as in Bombay and provide for neutralisation at the most at 90 per cent on the minimum wage of Rs. 28 in Ahmedabad. This contention was, however, rejected by the Industrial Court. By its award, the Court directed that the rise in the cost of living over pre-war level of 73 in the case of the lowest paid employee should be neutralised to the extent of 100 per cent and all employees earning Rs. 150 or less a month should be paid at a flat rate. On arithmetical calculation, it was found that this rate came to 2.84 pies per day for rise of each point in the cost of living index number over the pre-war figure.

The appellant Association issued a notice on 31st October, 1949, purporting to terminate this award with effect from 1st January, 1950. The ground for terminating the award set out by the appellant Association in its notice was that the textile industry in Ahmedabad was passing through a crisis and that certain mills were completely closed down while others were partially closing down. It appears that about that time, the Central Government acting in pursuance of the recommendations made by the Tariff Board, directed a 4 per cent cut in ex-mill cloth prices; and that, according to the appellant Association, led to a crisis in the financial affairs of the textile industry at Ahmedabad. It was also alleged in the notice that though the prices fixed were uniform, the dearness allowance paid was not uniform and that the member mills of the appellant Association were paying Rs. 15-4-0 more per month per employee in dearness allowance at Ahmedabad as compared to that paid to the textile employees in Bombay. Arithmetical calculation showed that as a result of this extra payment, the Ahmedabad mills had to bear an additional burden of Rs. 238 lakhs in 1949 as compared to the burden borne by the Bombay textile mills.

Before the notice thus issued by the appellant Association came into force, the respondent gave a notice of change to the mills to continue to pay the dearness allowance according to the existing award; and since no settlement could be reached between the parties, a reference was made to the Industrial Court. As a result of these proceedings, however, neither party scored a victory, and the award directed that payment of the dearness allowance should be made in accordance with the orders passed in Revision Petition No. 1 of 1947. Since the date when this order was made, the terms of the award in Revision Petition No. 1 of 1947 have been in operation between the parties.

Meanwhile, the Central Wage Board for the Cotton Textile Industry was constituted. One of the points which the Wage Board had to consider was the demand made by the employees for consolidating a part of the dearness allowance in the basic wage. The Wage Board recommended that 75 per cent of the dearness allowance should be consolidated in the basic wage, and the remaining 25 per cent. should bear a flexible character. The Board also made other recommendations which are not relevant for our purpose. In consequence of the recommendation made by the Board as to the consolidation of the dearness allowance, an agreement was reached between the appellant Association and the respondent, as a result of which a joint application (No. 1 of 1960) was made by both the parties under section 116-A of the Act; and on this joint application an award by consent was passed directing that 75 per cent. of the average dearness allowance of the first 6 months of 1959 which is Rs. 63-15-9 p.m. of 26 working days should be consolidated with the basic wage, and the balance of the dearness allowance should be paid as worked out on the existing basis that is how matters then stood between the parties.

It appears that about this time, there was a growing feeling amongst both the employers and the employees that the different series of consumer price index compiled and published in India were not very satisfactory and some of them had become obsolete. In the Second Five Year Plan, it was, therefore, recommended that it was desirable that steps should be taken simultaneously with the undertaking of the wage census to institute enquiries for the revision of the present series of cost of living indices at different centres. According to the recommendation made by the Planning Commission Report the Labour Bureau, Simla and the Central Statistical Organisation of the Government of India took steps to conduct fresh family living

surveys among working class and middle class population respectively with a view to construct the new series of consumer price index numbers. The working class surveys were conducted at 50 selected centres and the middle class surveys at 45 centres, 18 centres being common to both. The work of these surveys was commenced in the second half of 1958 and was concluded by September, 1959. One of the centres selected for this survey was Ahmedabad. The Government of India began to publish consumer price index number for the City of Ahmedabad, having index number 100 for the base year 1960. The publication of these series naturally raised the problem of arriving at a linking factor between the present series and the new series published by the State Government and the new series published by the Government of India. The Government of India considered this problem and indicated that 298 would be a proper linking factor. This figure was arrived at as a result of taking the annual average of the monthly index numbers of the State series for 1960 which then stood at 298. For the base year of 1960, the figure of the new series was 100 and the linking factor was, therefore, taken at 2.98.

It then appeared clear that there were several anomalies in regard to the collection of prices in the State series. Some of the items which were specified in such series had ceased to exist, whereas quotation for one major item, *viz.*, house rent allowance, had been frozen for many years. After the Government of India began to publish its new series, it advised the Government of Gujarat to stop publishing its old series and publish the converted index in its place. The Government of India thought that it would be unjust to the employees if the conversion were allowed to take place without removing anomalies of the State series.

Faced with this problem, the Government of Gujarat set up an expert Committee under the Chairmanship of Dr. M.B. Desai. The terms of reference of this Committee were thus formulated :—

"(1) to examine the validity of the submissions and representations made to Government and to make recommendations as to whether any readjustment is necessary in the existing series for Ahmedabad published by the State Government and if so what readjustment should be made ;

(2) to consider how the new series of Consumer Price Index Numbers for Ahmedabad should be linked with the existing series so readjusted if found necessary ; and in so considering to take into consideration the factor that the period of family budget enquiry on which the new series for Ahmedabad is based is different from the base period for the said new series."

The said Committee made a fairly exhaustive investigation, and made two main recommendations. The first recommendation involved an addition of 19 points in the overall price index in the State series and the same was fixed at 317 instead of 298 as it stood when the new series and its base period were decided upon. The other recommendation which it made was that the conversion or the linking factor should be 3.17 as against 2.98 per point in the new series.

The Government of Gujarat accepted the first recommendation and revised the index number for the month of November, 1963, by adding 19 points to the figure originally released by it and stated that its existing series would be adjusted month to month by the addition of 19 points for adjusting the index for clothing and house rent groups as recommended by the Expert Committee. In regard to the second recommendation, the Government took the view that it was necessary to continue publication of the current series to permit industry and labour time to have necessary modifications in the existing agreements, settlements and awards made to link up the dearness allowance with the new series published by the Labour Bureau, Simla. This decision was announced by the Government by a Press Note on 31st January, 1964.

When this decision of the Government of Gujarat was announced, the appellant Association found that it entailed considerable additional burden on the textile industry ; even so, it advised its member mills to pay the dearness allowance according to the adjusted consumer price index number by adding 19 points for the month of January, 1964, under protest. This protest was expressed by the President of the appellant Association by issuing a press communique criticising the Government for its unilateral and hasty decision in the matter.

On 29th February, 1964, the Government of Gujarat issued another Press Note by which it accepted the second recommendation made by the Expert Committee to take the linking factor at 317 instead of 298. The Press Note shows that this decision was reached by the Government of Gujarat in accordance with the advice received from the Government of India. In consequence of this decision the Government of Gujarat discontinued publication of the cost of living index number of its 1926-27 numbers from January, 1964. This decision of the Government raised a storm of protest from the appellant Association. A general meeting of the members of the appellant Association was held on 30th March, 1964, and it passed a resolution to the effect that the discontinuance of the publication of the cost of living index by the Government of Gujarat made it impossible for the appellant Association to comply with the terms of the existing award in respect of the payment of dearness allowance in the manner prescribed by the award and so, the appellant Association advised its members to pay to their employees dearness allowance for the month of March, 1964 calculated on the basis of the last published index number for the month of December, 1963 in the State's 1926-27 series and to continue to pay dearness allowance for succeeding months on the basis of the same index number till such time as the Government of Gujarat resumed publication of index numbers in the said series. According to the appellant Association, as a result of the decision of the Government of Gujarat, an unbearable burden would be imposed on the members of the appellant Association in the matter of dearness allowance; and so, it was not prepared to accept that decision.

When the appellant Association adopted this attitude, the Secretary of the respondent Association expressed his profound sorrow at the decision of the appellant Association, and by his letter addressed to the appellant Association on 3rd April, 1964, he requested the members of the appellant Association to pay dearness allowance to their employees according to the converted number published by the Government of Gujarat. This letter was accompanied by a resolution passed by the respondent Association in which it set forth its version of the financial position of the members of the appellant Association and the justice of the claim made by the employees for the payment of dearness allowance in accordance with the decision of the Government of Gujarat. The appeal thus made by the Secretary of the respondent Association did not, however, receive any sympathetic response from the appellant Association; and that made it necessary for the Government of Gujarat to refer the present dispute to the Industrial Court at Gujarat under section 73 of the Act. That, broadly stated, is the background and the previous history of the present dispute.

At the hearing of the present reference before the Industrial Court, the appellants had urged a preliminary objection against the competence of the present reference. They contended that the reference under section 73 of the Act was invalid, because before making the reference, the requirements of section 42 of the Act had not been complied with. The argument was that, in substance, the reference relates to a change in the terms of the award binding between the parties, and for effecting such a change, the procedure prescribed by section 42 and the other sections in Chapter VIII of the Act has to be complied with. It is common ground that the said procedure has not been followed and the Government of Gujarat has made the present reference in exercise of the power conferred on it by section 73. The Industrial Court has rejected the appellants' contention and has held that the reference is valid. Mr. Setalvad for the appellants has urged before us that the view taken by the Industrial Court is not justified by the terms of section 73 read along with section 42 of the Act.

The Act was passed by the Bombay Legislature in 1947. It purports to regulate the relations of employers and employees, to make provision for settlement of industrial disputes, and to provide for certain other purposes. It is a comprehensive piece of legislation and it makes elaborate provisions for the regulation of relations between employers and employees and for the settlement of disputes between them. Section 42 of the Act provides for a notice of change. It is unnecessary to cite the

provisions of the said section, because for the purpose of dealing with the point raised by Mr. Setalvad, it would be enough if we state the sum and substance of section 42 (1) and (2). Section 42 (1) provides that if an employer intends to effect any change in respect of an industrial matter specified in Schedule II, he will have to give notice of such intention in the prescribed form to the representative of employees. Similarly, section 42 (2) provides that if an employee desires a change in respect of an industrial matter not specified in Schedule I or III, he shall give notice in the prescribed form to the employer through the representative of employees. Mr. Setalvad relies on the fact that Entry 9 in Schedule II relates to wages including the period and mode of payment, and he points out that the definition of "wages" prescribed by section 3 (39) includes dearness allowance. His case is that the present dispute falls under Schedule II, Entry 9, and if the employees had intended to make a change in the existing award in relation to the payment of dearness allowance, it would have been necessary for them to take action as prescribed by section 42 (2). Since it is common ground that no notice of change has been given by the respondent it is urged that the reference made by the Government of Gujarat under section 73 of the Act is invalid. It would be noticed that this argument assumes that the provisions of section 42 would govern the provisions of section 73. The question is: is this assumption well-founded?

Let us then read section 73; it reads thus:—

"Notwithstanding anything contained in this Act the State Government may, at any time, refer an industrial dispute to the arbitration of the Industrial Court, if on a report made by the Labour Officer or otherwise it is satisfied that—

(1) by reason of the continuance of the dispute—

- (a) a serious outbreak of disorder or a breach of the public peace is likely to occur;
- (b) serious or prolonged hardship to a large section of the community is likely to be caused; or
- (c) the industry concerned is likely to be seriously affected or the prospects and scope for employment therein curtailed; or
- (2) the dispute is not likely to be settled by other means; or
- (3) it is necessary in the public interest to do so."

On a fair reading of section 73, it is plain that it deals with the powers of the State Government to make a reference and as such, it is difficult to assume that the said powers of the State Government are intended to be controlled by the provisions of section 42. Section 42 prescribes the procedure which has to be followed by the employer and the employee respectively if either of them wants a change to be effected as contemplated by it. The scheme of section 42 read along with the other provisions in Chapter VIII clearly shows that the said Chapter can have no application to cases where the State Government itself wants to make a reference. That is the first consideration which militates against the construction which Mr. Setalvad suggests.

The opening clause in section 73 also unambiguously indicates that the power of the State Government to make a reference will not be controlled by any other provision contained in the Act. This clause plainly repels the argument that the provisions of section 42 should be read as controlling the provisions of section 73. The meaning of the non-obstante clause is clear and it would be idle to urge that the requirements of section 42 must be satisfied before the power under section 73 can be invoked by the State Government.

It is, however, urged that the power conferred on the State Government by section 73 is the power to refer an industrial dispute to the arbitration of the Industrial Court, and there can be no industrial dispute unless a notice of change has been given either by the employer or the employee. In other words, the argument is that unless a notice of change is given as required by section 42, no industrial dispute can be said to arise between the employer and his employee, and that is how section 42 governs section 73. If it was the true legal position that there can be no industrial dispute between an employer and his employee unless a notice of change is given by either of them, there would have been some force in this contention; but the

definition of the words "industrial dispute" does not justify the assumption that it is only a notice of change that brings into existence an industrial dispute. Section 3 (17) of the Act defines an "industrial dispute" as meaning any dispute or difference between an employer and employee or between employers and employees or between employees and employees and which is connected with any industrial matter. This definition is so wide and comprehensive that it would be impossible to accept the argument that it introduces the limitation suggested by Mr. Sctalvad. Even if an award is subsisting between the parties but a difference arises between them, as in the present case, it is not easy to hold that the said difference does not amount to an industrial dispute for the purpose of section 73 merely because notice of change has not been given either by the employer or the employee. Therefore, we are satisfied that the dispute which has been referred by the Government of Gujarat in the present case must be treated as an industrial dispute, notwithstanding the fact that section 42 has not been complied with either by the appellants or by the respondent.

It is true that the power conferred on the State Government to make a reference is not absolute or unqualified. It can be exercised only if one or the other of the conditions specified by sub-sections (1), (2) or (3) of section 73, is satisfied. But once the State Government comes to the conclusion that one or the other of the said conditions is satisfied, its power to make a reference is not limited to cases where notice of change has been given by the parties as required by section 42. It is an over-riding power which is intended to be exercised to avoid anomalies or other serious consequences which would flow in case the Government does not make an immediate reference. The requirements prescribed by sub-sections (1), (2) and (3) of section 73 indicate the types of cases which are intended to be referred without requiring the parties to take recourse to section 42. In the present case, the Government of Gujarat was satisfied that the dispute was not likely to be settled by other means, and so, it made the present reference. Therefore, we do not think there is any substance in the argument that the reference is bad, because section 42 has not been complied with. The terms of section 73 are plain and unambiguous and they leave no doubt that the power of the State Government to make the reference is not at all controlled by the requirements of section 42.

On principle, the conferment of this power seems to be fully justified. If as a result of a dispute between the employer and his employees, a serious outbreak of disorder or a breach of the public peace is likely to occur, or a serious or prolonged hardship to a large section of the community is likely to be caused, or the industry concerned is likely to be affected adversely, it would be idle to require that even in the face of such a serious danger, the procedure, prescribed by section 42 must be followed before reference can be made under section 73. The very nature of the conditions prescribed by sub-sections (1), (2) and (3) of section 73 emphasises the fact that the said conditions refer to categories of cases or types of occasions on which reference has to be made promptly and immediately, and that explains the conferment of the wide powers on the State Government as prescribed by section 73. We are, therefore, satisfied that the Industrial Court was right in coming to the conclusion that the preliminary objection raised by the appellants against the competence of the present reference was misconceived. It appears that a similar view has been expressed by the Bombay High Court in *Suryaprakash Weaving Factory v. Industrial Court*¹.

That takes us to the merits of the controversy between the parties in the present appeals. Let us begin by briefly indicating the broad contentions raised by the appellants before the Industrial Court and its findings on them which are relevant for the purpose of the present appeals. The first contention which was urged before the Industrial Court was that the family living survey which was conducted by the Labour Bureau, Simla, in 1958-59 was unreliable, because the sample survey on which it was based was inadequate, and the interview method which was adopted in conducting it was unsatisfactory. It was also contended that the linking factor

at 3.17 which had been adopted by the Government of Gujarat was unscientific and irrational; and that the scientific and rational way to deal with the problem presented by the new consumer price index recently adopted by the Government of Gujarat would be to devise a scheme of dearness allowance afresh, taking the present basic salary as a base, and relating it to the changing price pattern from month to month with the base year 1960=100. The appellants' case in respect of this aspect of the matter was that for the purpose of fixing the dearness allowance, the basic salary should be taken to be the total amount which is paid to the lowest-paid employee after consolidating 75 per cent of the dearness allowance in the basic wage. That amount, it is said, represents the true basic wage today. In the alternative, it was suggested that if it is intended to correlate the present prevailing wage structure, including the scheme of payment of dearness allowance, by making suitable adjustments required by the change in the level of prices in the light of the new consumer price index with the same base year, it would be more rational and scientific to watch the behaviour of prices for two or three years and then devise a linking factor on the average rise in prices during the said period. The appellants also emphasised the fact that before the Industrial Court accepts the new arrangement on the basis of the linking factor of 3.17 it is essential to examine their paying capacity, and in this connection, they strongly urged that the burden which would be imposed on them by the new scheme would be plainly beyond their capacity.

The validity of these contentions was strenuously disputed by the respondent. It urged that the sample survey was conducted on rational and scientific lines and it did not suffer from any infirmity at all. It further argued that the attempt to construct a new wage structure by making the basic salary with 75 per cent of the consolidated dearness allowance as the basis with 1960=100 as the base year, would be beyond the terms of reference, and it would, besides, create many problems and complications. According to the respondent, the basic salary still continues to be what it was before, though for practical purposes 75 per cent of the dearness allowance has been consolidated with it. The respondent seriously challenged the appellants' case that the co-operation of the linking factor was either unscientific, unreasonable or unjust; and the appellants' theory that the average rise in prices should be determined after watching the behaviour of prices for two or three years, was characterised by the respondent as unreasonable, inexpedient and unscientific. The respondent emphatically contended before the Industrial Court that the appellant's financial position was perfectly sound and the argument that the burden would be beyond their capacity is wholly untenable.

During the course of hearing before the Industrial Court, the appellants examined two Experts, Mr. Gokhale and Mr. Chokshi. They also led voluminous documentary evidence. The respondent filed detailed statements disputing the correctness of the pleas taken by the appellants, and in support of them, they filed several charts which were prepared from the balance-sheets of the appellants themselves. Both parties referred to the opinions expressed by several writers on the subject of the preparation of consumer price index and on other matters which became relevant for the decision of the present dispute. Broadly stated, the Industrial Court has rejected all the contentions raised by the appellants. It has found that the recent survey was conducted under the advice and guidance of a technical advisory committee of a high order and that the work of carrying on the survey had scrupulously followed the relevant recommendations made by the International Labour Office and the United Nations. The Industrial Court did not accept the contention of the appellants that the sample size was inadequate or had vitiated the quality of the survey. It held that the method of inquiry adopted by the Investigators who conducted the survey was by no means unsatisfactory or unscientific, and in its opinion, having regard to the local conditions, it was indeed the most feasible and satisfactory way to adopt. The adoption of the interview method did not in the opinion of the Industrial Court, introduce any infirmity in the survey. The Industrial Court was thus not satisfied that the compilation of the consumer price index number by the Labour Bureau, Simla, for the city of Ahmedabad was not proper or was unscientific or suffered from any major infirmity.

In regard to the question of the linking factor on which both parties addressed the Industrial Court elaborately, the Court considered the matter in the light of expert opinion cited before it and held that the Government of India was justified in recommending a simple arithmetical method of linking; it found that the said method had been accepted by the Expert Committee appointed by the Government of Gujarat and had been recommended by the Expert Committee appointed by the Government of Maharashtra as well. It, therefore, reached the conclusion that the said method based on the application of the linking factor at 3.17 was the most suitable to adopt. In this connection, it rejected the appellants' suggestion that the dearness allowance should be paid at a flat rate and held that flexible dearness allowance alone would meet the ends of justice and would lead to industrial peace. It noticed the fact that now there was only one cost of living index existing in Ahmedabad and that is based on the new series. The old series had rightly gone out of existence since it had become antiquated. In this situation, there were two possibilities; one was to work out an entirely new scheme of basic wages based not on the pre-war level of 1939, but based on the cost of living of 1960 as the base year and to award dearness allowance thereafter. The Industrial Court thought that if such a course was to be adopted, it would create a large number of problems in the industry and would seriously disturb industrial peace. It observed that this aspect of the matter would also be beyond the terms of its reference. Nevertheless, it was inclined to take the view that "the results in terms of rupees, annas and pies may also not be very different", if this alternative method was adopted. It suggested that such a method may be adopted by the Central Cotton Textile Wage Board which had been recently appointed with a view to bring out a fair amount of uniform wage level all over India; but speaking for itself, it held that it would not be necessary, advisable or practicable for it to attempt that task. That left only one alternative and that is the adoption of the arithmetical method of linking. The argument that even if the arithmetical method of linking is intended to be adopted, it should be worked on the basis of the average result derived from watching the behaviour of prices during two or three years, does not appear to have been seriously pressed before the Industrial Court and has not been examined by it.

The Industrial Court then considered the question about the paying capacity of the appellants. As a matter of law, it rejected the respondent's argument that a wage structure once constructed by industrial adjudication can never be revised to the detriment of workmen, and it held that if it was shown that the financial position of the employer had substantially deteriorated and such deterioration was likely to persist for some time, it would be open to industrial adjudication to make a suitable revision of the wage structure, provided, of course, the wage structure does not represent the wages at their basic minimum level. Considering the problem presented by the appellants' plea of incapacity to bear the burden in the light of this legal position, the Industrial Court has found that, in its opinion, the textile industry in Ahmedabad is in a sound financial position. It has also added that,

"in any event there has been no substantial deterioration in its condition so as to justify cut or abandonment of the basic principles in respect of its employees which have been laid the past."

It is on these findings that the Industrial Court has held against the appellants on issues 2 and 3. As we have already mentioned, the Industrial Court has held against the respondent on issue No. 1; but since the respondent has not challenged the correctness of the said finding, it is only the conclusion of the Industrial Court on issues 2 and 3 that fall to be considered in the present appeal.

The first point which we must now consider is whether the appellants are justified in contending that the Industrial Court erred in over-ruling their contention that the new survey suffered from two major infirmities— inadequacy of the sample size, and impropriety of the method of interview adopted by the Investigators. In support of this plea, the appellants examined Mr. Gokhale as an expert witness. Mr. Gokhale who served in the Labour Office at Bombay from 1926 to 1937, was directly associated with the family budget inquiries, compilation of cost of living

index numbers, and with the first General Wage Census conducted by the Labour Office in Bombay. He also worked as Assistant Secretary of the Bombay Textile Labour Enquiry Committee. Later, he joined the Millowners' Association, Bombay, as their Labour Officer on 1st January, 1938 and served in that capacity until he retired on 1st November, 1962. He was deputed on a study tour to Lancashire in 1951 and attended the International Labour Conference at Geneva. He has also been a member of the I.L.O. Committee on Women's Employment. According to Mr. Gokhale, the new survey was not as scientific as it might have been. He was inclined to take the view that the sample selected in the Ahmedabad inquiries was very inadequate. He commented on the fact that the choice of the size of sample was determined, *inter alia*, on the ground of the workload manageable by the investigator, and he said that it was difficult for him to understand as to why in deciding the sample size "workload manageable by the investigator" had to be considered as a relevant factor. He then produced a chart showing the ratio of the size of the universe with the size of sample, and said that nowhere had he found such a low size of the sample as in the impugned inquiry. The size of the sample, according to him, in the impugned inquiry was less than even half a per cent. of the population group which was intended to be covered.

Mr. Gokhale was cross-examined by the respondent. It was put to him that his experience in the matter of sample survey was somewhat limited and that the said experience had now become antiquated in view of the great strides of progress which had been made in the science of sample survey after 1926. He agreed that sampling technique involves knowledge of statistics and statistics involves mathematics, and he did not make any claim to be an expert either in statistics or in mathematics. In his examination-in-chief, Mr. Gokhale appeared to criticise the extent of imputation which was evident in the preparation of the new series; but in his cross-examination, he fairly conceded that imputations have always got to be done in compiling consumer price index. It had been done in the past, he said, as also in the case of the present series. When he was asked whether he knew what the percentage of imputation was in the compilation of the consumer price index of 1926-27, he admitted that he did not know. He was, however, reluctant to agree with the Labour Bureau in so far as the application of their reasons to individual items was concerned, and in support of his theory he relied upon the illustrations given by him in the affidavit which he had filed before he gave evidence.

The statements made by Mr. Gokhale in his affidavit were disputed by the respondent and the accuracy and the validity of the views expressed by him were seriously challenged by Mr. Vasavada who filed a reply on behalf of the respondent (Item 19). In his reply, Mr. Vasavada referred to Clause 14 of the Resolution as reported at page 403 of the International Labour Code—1951, Volume II; and emphasised the fact that the main distinguishing feature of the new survey was that it was carried out under the technical guidance of professional statisticians not only with adequate knowledge of sampling theory but also with actual experience in sampling practice, and with the help of a properly trained field and computing staff. This was the requirement laid down by the publications issued by the I.L.O. and the United Nations as a very important test, and the impugned survey fully satisfies the said test. Mr. Vasavada also referred to the opinion expressed by Dr. Basu who is at present the I.L.O. Expert on the subject, that the size of the sample should be determined in the light of the permissible margin of error in the resulting Series of consumer price index numbers. In our country, the permissible margin of error in the index has been broadly set at 2 per cent; and so, the case set out by Mr. Vasavada on behalf of the respondent was that when the permissible margin of error in the index is 2 per cent. the number of families, *viz.*, 722 taken at Ahmedabad is highly satisfactory.

Mr. Vasavada then questioned the accuracy of Mr. Gokhale's statement that such a small percentage of the universe had never been adopted before in any other inquiry. He urged that the present techniques have advanced so far that a small sample size can achieve the best results; and he cited the example of a survey carried

out in the United Kingdom where the proportion of 13,000 households surveyed to the total households which constituted the universe came to 0.1 per cent. The Industrial Court has considered the evidence given by Mr. Gokhale and has taken into account the arguments urged on behalf of the respondent, and it has held that the size of the sample selected for the impugned survey cannot be said to introduce any infirmity in the survey. The question which we have to decide is whether the Industrial Court was right in coming to this conclusion.

In dealing with this question, it is necessary to refer briefly to the genesis and growth of the science of Social Survey. In its broadest sense says the Encyclopaedia of the Social Sciences,

"a social survey is a first hand investigation analysis and co-ordination of economic sociological and other related aspects of a selected community or group. Such a survey may be undertaken primarily in order to provide material scientifically gathered upon which social theorists may base their conclusions; or its chief purpose may be to formulate a programme of amelioration of the conditions of life and work of a particular group or community" ¹.

Wells defines a social survey as a

"fact-finding study dealing chiefly with working-class poverty and with the nature and problems of the community" ² :

As Moser has, however, pointed out,

"this definition might have covered the classical community and poverty studies but would hardly be adequate, the first part at any rate, to the modern forms of survey" ³.

The history of social survey in England can be said to have begun with the publication of Mayhew's book "London Life and the London Poor" published in 1851; and Booth made a very significant contribution to the scientific development of social survey by publishing his book "Labour and Life of the People of London" (1889-1902). Rowntree followed with his book "Poverty: A study of Town Life". Thereafter, a number of studies have been made by social scientists, and the subject of the theory and practice of social survey has been the subject-matter of valuable and extensive literature all over the civilized world. During the First World War and thereafter, social scientists devoted their attention to the problem of family living studies mainly from the point of view of the impact of price changes on consumers' economic situation. The development of reliable consumer price indices naturally involved the use of weights that would properly reflect the consumption expenditure of the population. This led to further extension of family living studies in different countries and for different periods, mainly to secure information on patterns of consumption expenditure.⁴

The Second World War and the conditions that flowed from it made it necessary to carry on investigations on a wide range of inquiry relating to all aspects of living conditions, e.g., nutrition, health, education and employment. The whole question of family living survey came up for consideration in the Seventh International Conference of Labour Statisticians in 1949. This Conference adopted a resolution defining the objections of family living studies and setting new international standards as regards the organisation of enquiries and the analysis and presentation of the results that flowed from it.⁴

In India, a standardised statistical type of family living study was first initiated in Bombay in 1921. Such enquiries were also conducted in Sholapur in 1925, in Ahmedabad in 1926 and in some centres in Bihar in 1923. While reviewing the position of social surveys in India, the Royal Commission on Labour pointed out the great paucity of statistical material in this country for judging the standard of living of the workers and recommended conduct of socio-economic enquiries of the type of family living surveys. This report naturally gave an impetus to the

1. Encyclopaedia of the Social Sciences, Vol. XIV, edited by Edwin R.A. Seligman, p. 162.

2. Wells, A.F. (1935). The Local Social Survey in Great Britain, Allen and Unwin, London.

3. "Survey Methods in Social Investigation"

by C.A. Moser, p. 1.

4. "Labour Survey Techniques" issued by the Labour Bureau, Ministry of Labour & Employment, pp. 171-72.

conduct of family budget enquiries. In all the surveys that followed, sampling and interviewing techniques were adopted, though, of course, not of a much advanced nature. A statistical analysis of the data collected was also attempted.¹

The Second World War saw the appointment of the Rau Court of Enquiry constituted under the Trade Disputes Act, 1929. One of the recommendations made by the said Court was that the Central Government should take up responsibility for maintaining up-to-date cost of living index numbers for important areas and centres. The Government of India accepted this recommendation and set up a special organisation called 'the Directorate of Cost of Living Index Numbers' and family budget enquiries among industrial workers were conducted at 28 centres during 1944-45 in the course of which 2,700 budgets were collected. A remarkable feature of these enquiries was that for the first time in this country, an attempt was made to conduct such enquiries simultaneously at a large number of the centres under more or less uniform techniques. During the same period, the Labour Bureau of the Government of India and some of the Organisations of State Governments continued to conduct family budget enquiries from time to time at specific areas or centres, either for deriving weighting diagrams for consumer price index numbers or for collection of data required for fixation of minimum wages.¹

It was in the background of these events that the Second Five Year Plan made a significant recommendation. The Plan said that :—

"The existing wage structure in the country comprises in the main, a basic wage and a dearness allowance. The latter component in a majority of cases has relation to cost of living indices at different industrial centres. These indices have not been built up on a uniform basis; some of them are worked out on primary data collected about 20 to 25 years ago and are therefore not a true reflection on the present spending habits of workers. Since one of the questions which the wage commission will have to take into account is the demand made by the workers' organisations for merging a part of dearness allowance with the basic wage evolving recommendations for such a merger will not be sufficiently scientific if cost of living indices at different centres do not have a uniform basis. Steps will therefore have to be taken simultaneously with the undertaking of a wage census to institute enquiries for the revision of the present series of cost of living indices at different centres."

It is in pursuance of this recommendation that the impugned survey was made.

Let us now see on what principles and methods the impugned survey was made. It is necessary to begin the discussion of this question with the observation :

"that the consumer price index number measures nothing but changes in prices as they affect a particular population group ; and so it is really a price index number as distinct from a cost of living index number. In fact, these indices used to be termed as cost of living, index numbers in the past, but in order to make their meaning clear it was decided by Government to change the name to consumer price index numbers in accordance with international recommendations and growing practice in other countries. Most of the State Governments compiling such index numbers have also adopted this usage."²

This index number is intended to show over a period of time the average percentage change in the prices paid by the consumers belonging to the population group proposed to be covered by the index for a fixed list of goods and services consumed by them. The average percentage change, measured by the index, is calculated month after month with reference to a fixed period. This fixed period is known as the "base period" of the Index ; and since the object of the index is to measure the effect of price-changes only, the price-changes have to be determined with reference to a fixed list of goods and services of consumption which is known as a fixed "basket" of goods and services.

The index does not purport to measure the absolute level of prices but only the average percentage change in the prices of a fixed basket of goods and services at different periods of time. There are certain preliminary considerations which are relevant in the construction of consumer price index numbers. The first consideration is the purpose which the index is intended to serve ; and that necessarily involves the definition of the group of consumers to which the index is intended to relate. Then it is necessary to determine the consumption level and pattern of the population group at a period of time which generally becomes the base-period of the index

1. "Labour Survey Techniques issued by the Labour Bureau, Ministry of Labour and Employment, pp. 172-73.

2. "A Guide to Consumer Price Index Numbers" issued by the Labour Bureau, M.O. Labour and Employment, p. 5.

numbers. For that purpose, a list of commodities and services has to be made. Usually, this list would contain items of food, fuel and light, clothing, and others items of services, such as barber charges, bus fare, doctor's fee, etc., have also to be selected. It is the combined total of the items of commodities and services that constitutes the basket. Then follows a description of the quality of each commodity and service through which price changes have to be measured. Generally, one quality which is popularly consumed by the population group is selected for each commodity and service. The importance or weight which has to be attached to each commodity or service is also a material factor. For instance, if rice is considered to be twice as important as wheat in the consumption pattern, the weight of rice will be 2 in relation to 1 of wheat.

Having determined the consumption level and the pattern of the population group, the next task to attempt is to arrange for the regular collection of price data for the various qualities of commodities and services which enter the basket. With this material, the consumer price index has to be compiled from month to month subsequent to the base period. That, shortly stated, is the nature of the preliminary considerations which have to be borne in mind while constructing the consumer price index numbers.

We have just noticed the theory of weights on which weighting diagrams are prepared. Weights are intended to indicate the importance attached to the percentage changes in the prices paid by consumers for different items (commodities and services) of consumption. Accordingly, each item in the index is given, what is called in technical language, a "weight" to represent the relative importance of the price change recorded for that item. This weight means nothing more than the percentage of expenditure on each item of goods and services in relation to the total expenditure. It will thus be seen that the main basis for determining the weights of respective commodities and services is the investigation of the family budget; and that emphasises the importance and significance of a proper investigation. During the course of investigation, data are collected on all items on which money has been defrayed by families; but only such items as involve consumption expenditure are included in the average budget. Even so, it is only selected items which find a place in the index calculations, because it is obviously neither practicable nor necessary to include all items featuring in the average budget. Since only a sample of items from each group is included in the index, it becomes necessary to enquire as to what happens to other items featuring in the average budget but not included in the index. Their weights are added or distributed to the items included in the index, so that the total expenditure of the average budget is fully taken into account in the weights adopted for the index. This process is known as "imputation" of weights. Besides the weights the other set of primary data which enter into the compilation of a series of consumer price index numbers are the prices; and that emphasises the importance of collecting material data in respect of prices. The Investigator, therefore, has to bear in mind all the relevant factors that ultimately go to the construction of the index, and has to carry on his investigation in a proper and scientific way.

Having thus briefly reviewed the theoretical aspects of the factors that govern the construction of consumer price index numbers, let us now proceed to see how the impugned inquiry was in fact held. The material evidence which will assist us in this part of our inquiry is furnished by the Report on Family Living Survey among Industrial Workers at Ahmedabad, 1958-59. From this report it appears that the organisation of the survey was based on the co-operation of several institutions. The survey was sponsored by the Labour Bureau, Ministry of Labour and Employment, Government of India; and its technical details were worked out under the guidance of a Technical Advisory Committee on Cost of Living Index Numbers consisting of the representatives of the Ministries of Labour and Employment, Food and Agriculture, Finance, Planning Commission, the National Sample Survey Directorate, the Department of Statistics (C.S.O.), the Indian Statistical Institute and the Reserve Bank of India. The field work was entrusted to the

Directorate of National Sample Survey, and processing and tabulation of data collected in Schedule 'A' (Family Budget) to the Indian Statistical Institute, Calcutta. The tabulation of data collected in Schedule 'B' which dealt with Level of Living was done in the Labour Bureau. It was a multi-purpose survey; and so, the investigation conducted under it covered both the Family Budget, and the Level of Living. Ultimate analysis of the data, publication of reports on the results of the surveys and construction and maintenance of new series of consumer price index numbers were the responsibilities of the Labour Bureau.

The first thing that the Organisation did was to define a "working class family", because this definition determined the size of the universe. A working class family which was the basic unit of the survey, was defined in terms of sociological and economic considerations as consisting of persons :

- " (i) generally related by blood and marriage or adoption ;
- (ii) usually living together and/or served from the same kitchen ; and
- (iii) pooling a major part of their income and/or depending on a common pool of income for a major part of their expenditure. "

Then followed the delimitation of area. The geographical area to be covered during the survey was decided in consultation with local organisations both official and non-official. At the Ahmedabad centre, 46 localities were selected for the purpose of the survey ; they consisted of 16 Chawls, 21 Labour Colonies (Housing Societies) and 9 Villages. Before settling the ultimate units of the family living survey, *viz.*, the families, two types of sampling methods were adopted ; they were the tenement sampling and the pay-roll sampling. The sample size for a centre was determined on the basis of the number of industrial workers, the type of sampling followed, the work-load manageable by an Investigator and the required precision of weights to be derived from Schedule 'A' for consumer price index numbers. The sample size for Ahmedabad was 720 families to be canvassed for Schedule 'A'. The number of schedules finally collected and tabulated was 722 for Schedule 'A'. The two samples drawn for Schedules 'A' and 'B' were, however, mutually exclusive, because canvassing for both the schedules from the same sampled families would have caused fatigue both to the Investigators and the informants. The whole sample was staggered over a period of 12 months evenly so as to eliminate the seasonal effects on the consumption pattern. The selection of sample was done in two stages. In the first stage, the chawls within each of the wards were grouped to form blocks of about 150 households each and these blocks along with the labour colonies (housing societies) were grouped to form clusters of about 450 households each, so that each cluster had blocks from different wards. From the list of these clusters and villages, 4 independent simple systematic samples of 12 clusters or villages each were selected for survey. Each of the 12 clusters sampled for an Investigator was assigned to a particular month for enquiry by a random process. That is how the first stage was arranged.

The second stage unit for selection was a working class family. Each month, the Investigator listed all the families in the cluster allotted to that month by house-to-house visit and classified them as working class families and others. While listing, information was also collected on the family size, the expenditure class to which it belonged and the State of origin of the head of the family. This information was utilised to arrange the working class families in the cluster, first by family size and within these classes by expenditure class and within these by the State of origin. A simple systematic sample of 20 working class families was drawn from this arranged list. Every fourth family in this sample was contacted for filling Schedule 'B' (on Level of Living) and the remaining three were for Schedule 'A' (on Family Budget). That is the nature of the procedure adopted in selecting the families for sample survey and determining the size of the sample. The sample survey was designed to cover a period of 12 months at each centre. At Ahmedabad centre, the work was carried on between August, 1958 and July, 1959. The method of survey was the "interview method." The questionnaire which each Investigator adopted covered a wide range of subjects, accurate replies to some of which

could not be had without explaining the significance of the questions to the persons concerned.

The population of Ahmedabad is about 11.5 lakhs. The working class population in Ahmedabad was reported to be concentrated in 13 localities. The markets predominantly patronised by the working class population in Ahmedabad were 6 and it is these markets that were selected for the collection of retail prices for the new series of consumer price index number for Ahmedabad centre.

This summary of the Report gives us a broad idea as to the manner in which and the method by which the investigation was made which ultimately led to the construction of the consumer price index number.

Reverting then to the objections raised by the appellants that the size of the sample was inadequate and the methods of investigation was inappropriate, can it be said that the Industrial Court was in error in holding that these objections were not valid? In dealing with this question, it is necessary to bear in mind that the size of the sample has to be determined in the light of the permissible margin of error in the resulting series of consumer price index numbers. As Dr. Basu has observed: "In our country, this permissible margin of error in the index has been broadly set at 2 per cent"¹; and that is not contradicted by the opinion of any other Expert. The sample of consuming units has to be selected by the application of scientific sampling techniques, and there is no doubt whatever that during the last 40 years, this branch of human knowledge has made remarkable progress. The optimum sample design is now worked out by competent statisticians in the light of the available material and requirements in each case, and as Dr. Basu has observed, "the desired data are secured at minimum cost and at an evaluation of sampling errors in the estimated data obtained from the survey." It is the quality of the survey that is more important, not so much the size of the sample or the number of families with whom investigation was made.

On the question about the adequacy of the sample size selected for investigation on the present occasion, it would be material to refer to the opinion expressed by Moser on this subject. Says Moser :—

"Most people who are unfamiliar with sampling probably over-rate the importance of sample size as such, taking the view that "as long as the sample is big enough, or a large enough proportion of the population is included, all will be well." The fallacy in this is clear as soon as one looks at any standard error formula, say (51) on page 61 above. If the population is large, the finite population correction $N - n/N - 1$ practically vanishes and the precision of the sample result is seen to depend on N , the size of the sample, not on n/N , the proportion of the population included in the sample. Only if the sample represents relatively high proportion of the population (say, 10 per cent. or more) need the population size enter into the estimate of the standard error."²

Mr. Kolah for the appellants has not cited before us the opinion of any Expert to the contrary.

Considering the question from a commonsense point of view, it seems to us reasonable to hold that if the quality of investigation has improved, and the method of working out the sample survey has made very great progress, then it would not be correct to say that because the size of the sample in the present case was smaller as compared to the size of the sample taken in 1926-27, the inadequacy of the size on the subsequent occasion introduces an infirmity in the investigation itself. That is the view which the Industrial Court has taken, and we see no reason to differ from it.

At this stage, it would be interesting to consider the comparative contents of the basket as it was devised in the two respective enquiries, one held in 1926-27, and the other in 1958-59. The former enquiry reflects the consumption pattern of the working class as it existed in 1926. The index number then devised was composed of five groups, viz., (1) Food, (2) Fuel and Lighting, (3) Clothing, (4) House rent,

1. A Basu on "Consumer Price Index", p. 54-55.

2. G.A. Moser on "Survey Methodology", p. 115, para 3.

and (5) Miscellaneous. The food group in its turn consisted of 16 items; the fuel and lighting group of 4 items; the clothing group of 7 items; the house rent group of the item of house rent; and the miscellaneous group of two items, viz., bidis and soap. Thus, in all, 30 items were included. These items represent 82.82 per cent. of the average monthly expenditure, and they were respectively assigned 58, 7, 10, 12 and 4 weights which together aggregate 91. At the time of this enquiry, the items included in the investigation totalled 49; out of them, 30 were priced and 19 were unpriced; and in respect of the latter, the method of imputation was adopted. This series was prepared after collecting the budgets of 985 families when the estimated population of the City of Ahmedabad was 2,90,000.

The new series is based on the enquiry into 722 working class families conducted in 1958-59 when the total population of the city was about 11 lakhs. The total working class families at this time were estimated to be 51.5 thousand; and so, the percentage of the sample size in relation to the universe of the working class families would come to about 1.4 and not less than .5 as appears to have been assumed by Mr. Gokhale. The weighting diagram for the new series is based on 110 articles divided in to the main groups of food, fuel and lighting, housing, clothing, and miscellaneous. The important groups in this enquiry carried respectively the weights of 64.41, 6.22, 5.05, 9.08, and 15.24 which aggregate to 100. The total number of items included in the basket was 239. Of these, 89 were priced items and 150 unpriced, and in respect of the latter, the method of imputation was adopted. It is true that in the new series, the unpriced items are considerably more than in the earlier one; but it must be remembered that it is not so much the number of items that makes the difference, but the percentage of expenditure on unpriced items to priced items. The total expenditure of all items in the 1926-27 enquiry was Rs. 36.01 of which Rs. 32.35 was the expenditure on priced items and Rs. 3.66 was the expenditure on non-priced items. In terms of percentage, the expenditure on priced items to total expenditure was 89.8 per cent. and expenditure on non-priced items to total expenditure was 10.2 per cent. In the latter enquiry of 1958-59, the total expenditure on all items was Rs. 139.06. Of this, Rs. 124.91 was the expenditure on priced items and Rs. 14.15 was the expenditure on non-priced items. In terms of percentage, the first expenditure was 89.8 per cent. and the second is 10.2 per cent. Thus, it is clear that the expenditure on unpriced items in the present enquiry is not larger than in the former enquiry at all. The fact that the components of the basket have considerably increased, cannot be a matter of surprise, because with the growth of Indian economy and the change in the standard of living of all citizens, the requirements of the working class have also increased and the components of the basket which was devised in 1926-27 have now become completely obsolete. It is in the light of this position that we have to consider whether the appellants are justified in contending that the inadequacy of the size of the sample vitiates the enquiry. In our opinion, the answer to this question must be against the appellants.

The next question to consider is whether the interview method is unscientific and its adoption makes the enquiry itself defective and unreliable. In dealing with this question again, it is necessary to remember that the interview method itself has made very great progress since 1926. The task of investigation is in no sense merely mechanical; it is a constructive task, the efficient discharge of which requires a well-trained Investigator. As Moser observes, the Investigators are expected to ask all the applicable questions; to ask them in the order given and with no more elucidation and probing than is explicitly allowed; and to make no unauthorised variations in the working (p. 188). Interviewers, according to Moser, are not machines. Their voices, manner, pronunciations and inflections differ as much as their looks, and no amount of instruction will bring about complete uniformity in technique; and so interviewers have to be properly educated in the task of putting questions to the families interviewed. What is true about asking questions, is also true about recording the answers. "The recording of answers," says Moser, "would seem a simple enough task and one which interviewers might be expected to perform with accuracy." But he adds that

"the task of interviewers is a fairly tiring one. With random sampling the interviewer may have travelled and walked a good way before getting to the respondent. He has to go through what is often a lengthy and always a somewhat repetitive operation" (p. 190);

and that makes the task of recording answers also important. The Interviewers are, therefore, appointed after selection, and it is now realized that their work is not at all mechanical and cannot be compared to the work of Investigators who collect data at the time of population census. The Investigator must take interest in the task that he has undertaken, must be accurate in asking questions and recording answers, must show an equitable temper in meeting the persons interviewed and must, above all, be a man of education who understands the significance of sampling survey and the purpose which it is intended to serve.

It is true that in England, the method of supplying account-books to the families is adopted. Under this method, the families are expected to fill in every detail in the account-book, and the cost of living is compiled from exact and correct information given by the persons who keep regular accounts according to the directions issued. But on the other hand, in countries like Canada and the United States, the method of interview is preferred to that of the account-books. It seems that according to Moser, the method of mail questionnaire, which corresponds in a sense with the method of account-books, suffers from several infirmities; and so, he seems to prefer the method of interview, provided, of course, this method is scientifically and efficiently adopted.

In our country where a majority of working class population still suffers from illiteracy, the method of interview is obviously indicated. It would be impracticable to suggest that a written questionnaire should be supplied to the members of the working class or account-books should be given to them in the expectation that they would furnish answers in return. Having regard to this special feature of the life of the working class as it obtains in our country today, the method of interview is the only method which can be adopted. Besides, as we have just indicated, even on the merits, expert opinion seems to suggest that if the interview method is properly adopted, it gives better results than the alternative method of account-books. Therefore, we are satisfied that the Industrial Court was right in rejecting the appellants' contention that the impugned survey and the index constructed as a result of it, suffer from the infirmity that investigation was conducted in this survey by the interview method.

That takes us to the question about the propriety of the linking factor which has been upheld by the Industrial Court. We have already noticed that the Government of Gujarat has adopted the linking factor at 3.17, and the Industrial Court has taken the view that no case has been made out by the appellants to interfere with the said decision of the Government of Gujarat. Mr. Kolah contended that if a linking factor has to be adopted, it would be more rational and scientific to watch the behaviour of prices for two or three years and then devise a factor on the average rise in prices during the period in question.

Mr. Vasavada, on the other hand, seriously disputed the correctness of Mr. Kolah's contention. As this case was being argued on the 24th March, 1965, the parties suggested that the question about the proper procedure to be followed in determining the linking factor in such cases was a very important question and that it would be better if we hear the views of Associations or bodies which would be interested in a proper solution of this problem. That is why on the said date we adjourned the hearing of the appeals to enable such interested parties to appear before us. The parties furnished a list of sixteen institutions or bodies which, according to them, would be interested in assisting us with arguments on this issue. On 2nd April, 1965, a letter of request was accordingly sent to these bodies indicating to them the nature of the question on which we wanted their assistance. In response to the said letter, only four bodies have appeared; they are: The All-India Organisation of Industrial Employers; the All-India Manufacturers' Organisation; the Millowners' Association, Bombay, and the Indian National Trade Uni-

Congress. The first three bodies appear broadly to support the appellants' view whereas the fourth body has resisted the appellants' contention that the Government of Gujarat was in error in adopting the linking factor at 3.17.

The appeals were then set down for hearing before us on the 2nd August, 1965, and we indicated to the parties that having regard to the unsatisfactory response which our letter of request had received, we did not think it would be appropriate that we should proceed to decide the larger issue raised by Mr. Kolah as to what would be a rational and satisfactory method of evolving a linking factor. The Indian National Trade Union Congress in its affidavit has urged that the method of linking of the new series with the old by the simple arithmetical ratio at the base period is universally accepted. It appears that the employers and the employees are not able to take a consistent stand on this issue and their approach apparently differs from region to region and industry to industry, because considerations of expediency and self-interest do not seem to dictate a uniform common approach to be adopted in the present case. Besides, the issue is of a very technical character and any decision of this Court on such an issue of principle is likely to affect several industries in this country. We have, therefore, decided not to embark upon a general enquiry on this point. Our decision will be confined to the material placed before the Industrial Court in the present proceedings, and we will merely examine Mr. Kolah's contention that the view taken by the Industrial Court is not correct. That is why we wish to make it clear that our present decision should not be taken to be of any general significance and should be confined to the facts of this case. If it is thought necessary or desirable by the employers and the employees that this question should be scientifically examined and determined in a general way, it would be appropriate for them to move the Government to appoint a special body of experts to deal with it.

Reverting then to the narrow question as to whether the appellants are justified in attacking the finding of the Industrial Court on this issue, let us mention a few relevant facts and considerations. We have already noticed that at the request of the Government of India, the Government of Gujarat discontinued the publication of the State series of the consumer price index; and so, it became necessary for the said Government to secure the advice of an Expert Committee as to how the new series of consumer price index for Ahmedabad should be linked with State series after making such adjustments therein as may be found necessary. The Expert Committee dealt with this problem of arriving at the linking factor, so that when the new series is adopted and the State series is discontinued, the dearness allowance on the present scale can be computed even on the basis of the new series. The Government of India, had, in this connection, indicated that 2.98 is appropriate linking factor. This figure had been reached by taking the annual average of the monthly index number of the State series for the year 1960 which then stood at 298. The figure of the base year 1960 was obviously 100. The linking factor of 2.98 was deduced by dividing 298 by 100. In doing so, however, the question about making necessary adjustments in the index numbers of the State and of the new series had not been considered. This question was considered by the Desai Expert Committee, and it held that the linking factor should be 3.17 as against 2.98 per point in the new series as was worked out without correcting the old series. In other words, the Desai Committee suggested as a linking factor a mere arithmetical ratio of 3.17.

A similar question was referred by the Government of Maharashtra to the Lakdawala Expert Committee, and the said Committee was inclined to take the same view. It no doubt observed that

"in spite of the fact a linking on the basis of a simple ratio corrects a series only in respect of one of its dimensions we recommend this course because we are of opinion that such a correction is adequate for the requirements of our terms of reference and in any case, the only correction that we can meaningfully carry out."

It would thus be seen that in accepting the linking factor at 3.17 the Government of Gujarat has adopted the conclusion of the Desai Expert Committee.

The question which arises is whether in upholding this view, the Industrial Court has committed any error. As the Industrial Court has observed, two possibilities presented themselves in attacking this problem. One was to work out an entirely new scale of basic wages founded not on the pre-war level of 1939, but on the cost of living of 1960 as the base year of the new series and to award dearness allowance hereafter. The Industrial Court thought that to adopt this course may conceivably create a large number of problems which do not exist at present and in fact, it may end to destroy industrial peace. The Industrial Court thought that such a course might even be outside its terms of reference. Even so, in its opinion, the result which would be achieved by adopting this course may not in the end be very different. The other course is to link the State series with the new series to maintain continuity. It is this latter alternative which has been adopted by the Government of Gujarat and the Industrial Court has approved of the said course. We are not satisfied that the conclusion thus recorded by the Industrial Court is shown to be erroneous.

As we have just indicated, the problem is a technical problem and it can be decided only in the light of the opinion which experts may form on examining all the aspects pertaining to the problem and after taking into account all the pros and cons which may be put before them by the respective interested parties. The stand which the parties may take in regard to this controversy would differ according as the change in the cost of living index in the respective States may help their interest one way or the other. That explains why there is no unanimity in the approach adopted by the different parties. This is made clear by the contentions raised by the respective parties before the Lakdawala Expert Committee.

There is no doubt that on the material as it stands, it would be unreasonable, inexpedient and in fact impossible for this Court to attempt to resolve this controversy on the basis of the larger issue of law raised by Mr. Kolah before us. The decision of that question must, therefore, be left to a Committee of experts if and when it is appointed. Meanwhile this question will have to be dealt with on an *ad hoc* basis in each industry, taking into account the particular facts and circumstances of each case.

Looking at the question from this narrow point of view, we do not think the appellants have placed before the Industrial Court any material to justify their contention that for determining a linking factor, the behaviour of prices for two or three years during the relevant period should and can be studied. In fact, Mr. Vasavada's contention is that a study of the behaviour of prices for such a period and deducing the average therefrom would be inconsistent with the notion of evolving a linking factor. He contends that we have to take one year by reference to which this problem must be resolved. We express no opinion on this part of the controversy between the parties. In fact, the Award under appeal shows that the argument which Mr. Kolah has urged before us was not placed in this form, and in any case does not appear to have been pressed, before the Industrial Court. Even assuming that it would have been open to the Industrial Court to consider this larger issue under the terms of its reference, we do not see how the Industrial Court could have attempted to solve the problem satisfactorily on the material placed before it. Therefore, we cannot accept Mr. Kolah's argument that the Industrial Court was not justified in upholding the decision of the Government of Gujarat that the linking factor should be taken at 3.17.

The last question to consider is whether the Industrial Court was right in coming to the conclusion that the additional burden which its award would impose upon the appellants would not be beyond their financial capacity. In dealing with this question, there are two general considerations which cannot be ignored. The first consideration is that the task of constructing a wage structure of industrial employees is a very responsible task and it presents several difficult and delicate problems. The claim of the employees for a fair and higher wage is undoubtedly based on the concept of social justice, and it inevitably plays a major part in the construction of a wage structure. There can be little doubt that if the employees are paid a better wage which would enable them to live in fair comfort and discharge their obligations

to the members of their families in a reasonable way, they would be encouraged to work wholeheartedly and their work would show appreciable increase in efficiency.

On the other hand, in trying to recognise and give effect to the demand for a fair wage, including the payment of dearness allowance to provide for adequate neutralisation against the ever-increasing rise in the cost of living, industrial adjudication must always take into account the problem of the additional burden which such wage structure would impose upon the employer and ask itself whether the employer can reasonably be called upon to bear such burden. The problem of constructing a wage structure must be tackled on the basis that such wage structure should not be changed from time to time. It is a long-range plan; and so, in dealing with this problem, the financial position of the employer must be carefully examined. What has been the progress of the industry in question; what are the prospects of the industry in future; has the industry been making profits; and if yes, what is the extent of profits; what is the nature of demand which the industry expects to secure; what would be the extent of the burden and its gradual increase which the employer may have to face? These and similar other considerations have to be carefully weighed before a proper wage structure can be reasonably constructed by industrial adjudication, vide *Express Newspapers (Private) Ltd. and another v. Union of India and others*¹. Unusual profit made by the industry for a single year as a result of adventitious circumstances, or unusual loss incurred by it for similar reasons, should not be allowed to play a major role in the calculations which industrial adjudication would make in regard to the construction of a wage structure. A broad and overall view of the financial position of the employer must be taken into account and attempt should always be made to reconcile the natural and just claims of the employees for a fair and higher wage with the capacity of the employer to pay it; and in determining such capacity, allowance must be made for a legitimate desire of the employer to make a reasonable profit. In this connection, it may also be permissible to take into account the extent of the rise in price structure which may result from the fixation of a wage structure, and the reasonableness of the additional burden which may thereby be imposed upon the consumer. That is one aspect of the matter which is relevant.

The other aspect of the matter which cannot be ignored is that if a fair wage structure is constructed by industrial adjudication, and in course of time, experience shows that the employer cannot bear the burden of such wage structure, industrial adjudication can, and in a proper case should, revise the wage structure, though such revision may result in the reduction of the wages paid to the employees. It is true that normally, once a wage structure is fixed, employees are reluctant to face a reduction in the content of their wage packet; but like all major problems associated with industrial adjudication, the decision of this problem must also be based on the major consideration that the conflicting claims of labour and capital must be harmonised on a reasonable basis; and so, if it appears that the employer cannot really bear the burden of the increasing wage bill, industrial adjudication, on principle, cannot refuse to examine the employer's case and should not hesitate to give him relief if it is satisfied that if such relief is not given, the employer may have to close down his business. It is unlikely that such situation would frequently arise; but, on principle, if such situations arise, a claim by the employer for the reduction of the wage structure cannot be rejected summarily.

This principle, however, does not apply to cases where the wages paid to the employees are no better than the basic minimum wage. If, what the employer pays to his employees is just the basic subsistence wage, then it would not be open to the employer to contend that even such a wage is beyond his paying capacity. Industrial adjudication has consistently recognised and enforced the principle that social justice requires that an industrial employer must be able to pay his employees a wage structure which can be reasonably regarded as basic minimum wage. No employer can be allowed to pay his employees wages which are below the basic

1. (1958) S.C.J. 113 : (1961) 1 L.L.J. 339 : (1958) S.C.R. 12 : A.I.R. 1958 S.C. 578.

minimum or the subsistence wage. It is well-known that in certain industries, minimum wages are fixed by the statute. Even where minimum wages are not fixed by statute, industrial adjudication can easily determine whether in a given case, the wage paid is basic minimum or not. In either case, where the wage answers the description of the basic minimum or subsistence wage, it has to be paid by the employer; and if he cannot afford to pay it, he would not be justified in carrying on his industry, *vide Crown Aluminium Works v. Their Workmen*¹. That is the second consideration which has to be borne in mind in dealing with the point raised by the appellants about their incapacity to bear the burden.

We have thought it necessary to refer to these two theoretical considerations at this stage, because if they are borne in mind, we get a proper perspective of the problem raised by the appellants' contention as to their financial capacity. In the present proceedings, the Industrial Court is not constructing any wage structure for the first time, nor is it dealing with the question of determining the quantum or the sliding scale of the dearness allowance to be paid to the textile employees at Ahmedabad. These matters have been considered in the past on several occasions and they are governed by consent awards passed between the parties. It is because of the new survey made in 1958-59 and the consequent change in the construction of the consumer price index made by the series published by the Government of Gujarat that the present dispute has arisen; and so, while dealing with the appellants' contention, it would be pertinent to enquire whether the appellants show that a case has been made out for reduction of the wages paid to the employees. It is of course, true that the wages paid to the textile employees at Ahmedabad cannot be regarded as subsistence wages or bare minimum wages; and so, it would not be open to the respondent to contend that the appellants must pay the said wages whether they can afford to pay them or not. If it is shown that the appellants cannot bear the burden and that the implementation of the award would inevitably have extremely prejudicial effect upon the continued existence of the textile industry itself, we would be justified in revising the scale of dearness allowance. But, as we have just indicated, such a plea can succeed only if it is shown satisfactorily that the burden cannot truly and really be borne by the textile industry at Ahmedabad. That is the proper approach to adopt in dealing with this problem; and the award under appeal shows that the Industrial Court did approach the problem in a proper way.

In support of their contention that the textile industry at Ahmedabad cannot bear the burden which would be imposed by the award, the appellants examined Mr. Chokshi. Mr. Chokshi is a Chartered Accountant and a senior partner in the firm of Messrs. C.C. Chokshi and Co. He has been practising as a Chartered Accountant for about 24 years. He was a member of the Council of the Institute of Chartered Accountants for 8 years and its President for one year. It appears that the appellant Association sent to him five statements and asked for his opinion on the financial position of the textile industry at Ahmedabad. Mr. Chokshi first filed an affidavit, in which he set out his opinions and then gave oral evidence. In his affidavit, Mr. Chokshi referred to the respective statements on which his opinion was based and he stated that the financial position of the textile industry at Ahmedabad was, on the whole, not very satisfactory.

In appreciating the evidence given by Mr. Chokshi, it would, therefore be material to indicate the nature of the statements on which his opinion was based. The first statement shows the depreciation, development rebate, and increase in gross block per year of the Ahmedabad Cotton Textile Mill Industry for the years 1945 to 1963. The statement indicates that all these items have increased from year to year; depreciation was Rs. 0.83 crore in 1945 and it rose to Rs. 6.68 crores in 1963; development rebate was Rs. 0.05 crore in 1954 and it became Rs. 1.26 crores in 1963; gross block rose from Rs. 20.25 crores in 1945 to Rs. 101.98 crores in 1963; and increase in gross block per year for the same years was Rs. 1.31 and Rs. 9.77 crores.

1. (1958) S.G.J. 209 : (1958) M.L.J. (Cal.) A.I.R. 1958 S.C. 30.
109 : (1958) S.G.R. 651 : (1958) 1 L.L.J. 1 :

The second statement shows the net worth and borrowings of the said industry during the same period. The emphasis in this statement was on the ever-increasing borrowings. In 1945, the borrowings, consisting of secured and unsecured loans and other deposits, were of the order of Rs. 9.58 crores, whereas in 1963, they rose to Rs. 47.76 crores. The third statement shows the working capital and borrowings for the period in question. The fourth statement shows profits after tax as percentage of net worth of the said industry for the same period. This statement refers to profits before tax, loss, tax provision, profits after tax, net worth, and the last column gives profits after tax and indicates percentage of net worth. It is the last column on which Mr. Chokshi relied when he gave his opinion that the financial position of the Ahmedabad textile industry was not very satisfactory. Whereas in 1945, the percentage of profits to net worth was 13.4 per cent., in 1963 it was 3.3 per cent. The last statement shows that dividends as percentage of net worth in different industries. It covers the period between 1951 and 1962. This statement shows that the dividends paid by the industry in question are comparatively on the low side. Dividends paid by 12 industries are shown in this statement, and it would be right to say that the textile industry has not been paying dividends which can be said to be very high in comparison to the dividends paid by other industries.

On the other hand, the respondent has filed several statements showing that the financial position of the appellants has been consistently good, and the fear that the appellants would not be able to bear the burden is entirely unjustified. Annexure II filed by the respondent along with its statement shows the percentage of wages to total income in Ahmedabad Cotton Textile Industry from 1939 to 1962. This percentage was 26 in 1939 and is 24 both in 1961 and 1962; for the intervening period, it has risen to 28 in 1949 and fallen to 20 in 1943. Annexure III gives the statement showing the growth of paid-up capital by cash in the said industry for the same period. In 1939, the paid-up capital by cash was 407 lakhs, whereas in 1962 it was 770 lakhs. Annexure IV shows the growth of total paid-up capital including bonus shares for the same period. This statement shows a remarkable growth of total paid-up capital in this manner. In 1939, the total paid-up capital was 442 lakhs, whereas in 1962 it has reached the magnitude of 2,129 lakhs. From 1950 onwards, this category of capital has been consistently rising. Annexure V shows the value of gross block for the same period. In 1939, it was 1915 lakhs, whereas in 1962 it rose to 9,341 lakhs. Annexure VI shows the amount of Depreciation Fund including Development Rebate; in 1939 it was 745 lakhs, whereas in 1962 it was 5,643 lakhs. Annexure VII shows the amount of Reserves excluding Depreciation Fund and Liability Funds; in 1939 they were 360 lakhs, while in 1962 they were 2,518 lakhs. From Annexure VIII we gather that the amount of Gross Profit including the Managing Agents' commission and depreciation was Rs. 159 lakhs in 1939, and it was Rs. 1,860 lakhs in 1961 and Rs. 1,296 lakhs in 1962. Incidentally, it is the figure of gross profit which is more important, because it is not disputed that wages payable to the employees are a first charge, and all other liabilities take their place after the wages. There are three other Annexures filed by the respondent, but it is unnecessary to refer to them.

The main comment which falls to be made on the opinion expressed by Mr. Chokshi is that he has looked at the problem merely from the investor's point of view. In fact, he fairly stated that he had made his analysis from the point of view of an investor. That explains why Mr. Chokshi took the view that absolute figures of mere gross profit or net profit from year to year would be misleading. He did not agree that most of the textile mills in Ahmedabad are at present under-capitalised. He conceded that in dealing with the problem of expanding business and increasing the wage bill, one of two methods can be adopted by the industry; the industry can increase the capital or borrow money. Very often, said Mr. Chokshi, borrowing is preferred to the increase of capital in certain market conditions. He was not certain whether borrowings had been resorted to by the textile industry for the purpose of expansion. In dealing with the problem of the financial capacity of the appellants to bear the burden, it would be inappropriate to rely solely upon the

approach which an investor would adopt in such a case; and so, we are not prepared to hold that the Industrial Court was in error in not accepting Mr. Chokshi's estimate about the financial position of the textile industry at Ahmedabad.

Mr. Kolah for the appellants has strongly relied upon certain statements made in the Reserve Bank of India Bulletin issued in July, 1964, in support of his argument that the financial position of the appellants was not satisfactory. Dealing with the position of the Cotton Textile Industry during the period under review the Bulletin says that cotton textiles recorded a steep fall of Rs. 17.0 crores in net profits as against a rise of Rs. 2.1 crores in the previous year. Applying the profitability ratio, the Bulletin goes on to say that cotton textiles, amongst others, showed declines in profitability. This test in evolved by the ratio of gross profits to sales, and the return on capital, as measured by the ratio of gross profits to total capital employed. According to the Bulletin, the decline in the return on shareholders' equity (ratio of profits after tax to net worth) was substantial in the case of cotton textiles along with other named industries. Table 4 in the Bulletin gives a comparative statement of the profitability ratio, industry-wise, in 1960-61, 1961-62 and 1962-63. It is arranged in five columns which deal respectively with gross profits as percentage of sales, gross profits as percentage of total capital employed, profits after tax as percentage of net worth, dividends as percentage of net worth, and dividends as percentage of paid-up capital. The figures shown against the cotton textiles in these five columns support the main comment made in the Bulletin that the position of the textile industry, considered as a whole in this country, was not quite satisfactory.

We do not think in considering the financial position of the appellants in the context of the dispute before us, it would be appropriate to rely unduly on the profitability ratio which has been adopted by the said Bulletin. Indeed, in appreciating the effect of the several statements produced before the Industrial Court by the parties in the present proceedings, it would be relevant to remember that some of these single-purpose statements are likely to create confusion and should not ordinarily be regarded as decisive. As Paton has observed :

"Different groups for whom financial statements are prepared are interested in varying degree in particular types of information ; and so it has been held in some quarters that no one form of statement will satisfactorily serve all these purposes that separate single-purpose statements should be prepared for each need or that the statements usually prepared for general distribution should be expanded so as to include all the detail desired."*

Paton cites the comment of Wilcox against these single-purpose statements. Said Wilcox :

"The danger in undertaking to furnish single-purpose financial statements lies in increasing confusion and misunderstanding and in the possible misuse of such statements for unintended purposes."

Paton has then referred to certain methods for determining the financial position of a commercial and industrial concern. In this connection, he refers to the proprietary ratio rate of earnings on total capital employed, rate of dividends on common stockholders' equity and others. Our purpose in referring to these comments made by Paton is to emphasise the fact that industrial adjudication cannot lean too heavily on such single-purpose statements or adopt any one of the tests evolved from such statements, whilst it is attempting the task of deciding the financial capacity of the employer in the context of the wage problem. While we must no doubt examine the position in detail, ultimately we must base our decision on a broad view which emerges from a consideration of all the relevant factors.

What then is the broad picture which emerges from the evidence on the record in respect of the financial position of the textile industry at Ahmedabad? The cotton textile industry at Ahmedabad can legitimately claim to be the oldest organised industry in the country. It recently celebrated its centenary in 1961. The story about the growth of this industry during this century is very heartening. In its early stages, it no doubt made a small and modest beginning ; but at the time

when the centenary celebrations were held, it had an installed capacity of about two million spindles and 42,000 looms and it employed 1,30,000 workmen. Statistics show that textile mills at Ahmedabad account roughly for one-third of the total mill production in the country, and it would be no exaggeration to say that some of the best varieties of cloth produced in the country are manufactured at Ahmedabad.

The paid-up capital by cash of the industry in 1939 was 4.07 crores and it became 7.70 crores in 1962. The total paid-up capital including bonus shares was 4.42 crores in 1939 and in 1962 it rose to 21.29 crores. It would thus be seen that out of the total paid-up capital of 21.29 crores in 1962, the capital collected by cash is 7.70 crores, whereas the balance of 13.59 crores is by way of bonus shares. In other words, the cash capital is increased by 175 per cent. because of capitalisation of the reserves. Similarly, the gross block in 1939 was 19.15 crores and in 1962 it rose to 93.41 crores. Almost the same rate of progress is evidenced by the Reserves. The Reserves excluding Depreciation Fund and other liability funds at the end of 1939 was 3.60 crores and they have gone to 25.18 crores in 1962. The gross profits have registered a similar rise. In 1939, the gross profit including Managing Agents' commission and depreciation was 1.59 crores, whereas in 1962 it has reached the magnitude of 12.96 crores. In this connection, it would be unreasonable to ignore the fact that the industry has been able to save and capitalise from 1939 onwards 13.85 crores and has been able to pay a fair amount of dividend on equity shares throughout the period, in spite of a very large capitalisation of reserves.

It is true that the textile industry at Ahmedabad has been leaning very heavily on borrowings; but that may partly be due to the fact that the said industry has for several decades been under-capitalised. Besides, the tendency to rely upon borrowings for expanding the business, is noticeable throughout this period of the life of textile industry at Ahmedabad and has been the subject-matter of comment by several persons. In fact, sometimes it is treated as a peculiar feature of the development of the textile industry at Ahmedabad; and so, the extent of borrowings cannot be pressed into service for the purpose of showing that the financial position of the industry is unsatisfactory.

One remarkable feature of the textile industry at Ahmedabad is the harmonious relations which have consistently subsisted between the employers and the employees. The employers, on the whole, are enlightened and progressive in their outlook, and the Trade Union leadership of the employees is also enlightened and progressive. Both the employers and the employees realize that the progress of the industry depends primarily on the co-operation between capital and labour; and the large number of consent awards and agreements to which they have been parties over a period of several years, is a standing tribute to the spirit of co-operation which inspires the textile industrial life in Ahmedabad. As one looks back over the last hundred years of the life of the textile industry at Ahmedabad, one is struck by the fact that industrial life in that area has rarely been disturbed by bitterness, feuds or general strikes. This spirit of co-operation, based on the willingness to give and take, alone can ensure the economic and industrial growth of our country, for, after all, it is the speedy economic growth of industry of the country which must be the ultimate object of both capital and labour. In considering the prospects of the textile industry in Ahmedabad, this feature must be given a place of pride.

It is significant that as a result of the spirit of co-operation between capital and labour, the textile industry at Ahmedabad has been able to enter into several agreements for rationalising the industry, itself. It is well-known that an attempt to rationalise textile industry inevitably involves retrenchment of a large number of employees; but the appellants and the respondents have entered into agreements of rationalisation after both of them agreed to three basic principles in that behalf. These principles are:—

- (a) Rationalisation to be effected without creating unemployment of the existing workers;
- (b) Gains of Rationalisation should be adequately shared between the Management and the workers; and

(c) The workload should not be increased in a manner which may jeopardise the health of the workers."

The fact that a large number of agreements have been made between the parties by consent concerning the vexed subject of rationalisation also shows that the future of the textile industry at Ahmedabad is bound to be as bright as it has been in the past. In this connection, we may refer to the tribute paid by the Central Wage Board to the Cotton Textile Industry at Ahmedabad. Says the Board :—

"The industry, however, is conscious of the need for rationalisation and modernisation as the *sine quo non* of survival, the pace of which had been checked in the past by the fear of unemployment; that fear has been allayed, and labour now recognises that its own welfare depends on rationalisation and modernisation, and it has agreed upon the broad lines for their introduction. Some mills even today have very modern and up-to-date machinery, and all mills which can manage to do so will have to rationalise and modernise; for the nation is on the march, and this industry must clothe the nation."

Let us then consider the question about the prospects of the demand for textile products in future and the increasing productivity of the industry. On this point again, it is difficult to share the pessimism disclosed by the attitude adopted by the appellants. There is little doubt that the productivity of the industry is increasing and that the demand for textile products will never be on the decrease in future. Therefore, we do not see how we can differ from the conclusion of the Industrial Court that the appellants have failed to substantiate their contention that the additional burden would be beyond their capacity to pay. In this connection, we ought to recall the fact that what the appellants are required to prove is that the prospects of their financial position in future justify a reduction in the wage which is being paid to the industrial employees during all these years; for that on the ultimate analysis would be the result if their contention is accepted. The Industrial Court has made a definite finding that it does not think that the financial condition of the industry has deteriorated so as to justify a departure from the principles in regard to dearness allowance hitherto laid down in respect of this industry at this centre. In our opinion, this conclusion is well-founded.

It was conceded before us that our decision in Civil Appeals Nos. 167-173 of 1965 would govern the decision of Civil Appeals Nos. 537-538 of 1965. So, the result is that all the said appeals fail and are dismissed with costs. One set of hearing fee.

K.G.S.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—A. K. SARKAR, RAGHUBAR DAYAL AND V. RAMASWAMI, JJ.

The Martin Burn, Ltd.

.. Appellant*

v.

The Corporation of Calcutta

.. Respondent.

Calcutta Municipal Act (III of 1923) sections 127, 131, 139 to 142 and 147—"Annual value" of premises let or intended to be let—Determination of—Provision applicable—Appeal to Small Cause Court—Assessment set aside with direction to re-value under section 127 (a)—Appeal to High Court by the Corporation—Order of lower Court maintained but remanded to Small Cause Court itself to re-value under clause (a) of section 127—Validity of remand order.

The owner of premises No. 12, Mission Row, Calcutta, appealed to the Presidency Court of Small Causes against the order of the Deputy Commissioner, on the objections to revised assessment which reduced the amount but sustained the mode of determining the annual value (market value of land plus cost of construction). The only point raised in the appeal was that the 'annual value' should have been determined under section 127, clause (a) of the Calcutta Municipal Act, 1923 (*i.e.*)

rental basis, and the mode adopted under section 127, clause (b) was erroneous. The Court set aside the assessment wholly and directed revaluation under clause (a) of section 127 'starting from the proceedings prescribed under section 131 (2) (b) of the Act.'

The Corporation appealed against that order to the High Court of Calcutta which maintained the order appealed from, but observing that the direction of the Court below was however infructuous as the time limit prescribed therefor had expired, remanded the case directing the Small Cause Court to ascertain the 'annual value' making also certain consequential directions as to procedure. This order of remand is the subject-matter of appeal to the Supreme Court.

Held (By majority) (*Ramaswami, J.*,) contra: The Calcutta Municipal Act does not at all contemplate a valuation made by a Court on its own. Such a valuation would be futile and would create no statutory liability. The order cannot be sustained.

The High Court did not direct the Small Cause Court to revise a valuation or to alter a previous valuation; secondly, the valuation directed cannot be called a revised valuation or a previous valuation altered; the previous valuation had been cancelled. A thing is revised or altered when it is retained with some modifications.

A result flowing from a statutory provision is never an evil. Courts have no power to ignore the provision to relieve what it considers a distress resulting from its operation. If the statute does not give the Court the power to make the valuation it cannot be said to possess that power so that the supposed object (collection of rates) may be achieved. When the High Court found that section 131 (2) (b) has been attracted to the case, it had no power to set that provision at naught.

It was not within the inherent powers of the High Court to remand the case for doing a thing which the Act did not countenance.

Per *Ramaswami, J.*—It is manifest from the order of the High Court that, "annual value" has not yet been finally determined; the matter is still pending adjudication. It is not therefore correct to say that there has been a cancellation of the valuation within the meaning of section 131 (2) (b) of the Act; the case falls under section 147 of the Act and is a case of revision of the valuation thereunder.

The subject-matter of the appeal before the Courts below was the valuation of the premises and not merely in regard to the basis of valuation (*vide* Section 142). The argument that the order of remand by the High Court was beyond the scope of its appeal, cannot be accepted.

The directions in the operative portion of the order have to be set aside and in its place there should be an order for remanding the case to the Small Cause Court for ascertainment by itself of the annual value under the provisions of section 127 (a).

Appeals by Special Leave from the judgment and Order dated the 3rd August, 1959 of the Calcutta High Court in Appeals from Original Order Nos. 124 and 125 of 1956.

Niren De, Additional Solicitor-General of India, (*S. R. Banerjee* and *S. N. Mukerji*, Advocates with him), for Appellant.

A. V. Viswanatha Sastri, Senior Advocate (*P. K. Mukherjee*, Advocate, with him), for Respondent.

The Court delivered the following judgments:

Sarkar, J. (for himself and *Ragubar Dayal, J.*).—These two appeals arise out of proceedings for ascertainment of the annual value of premises No. 12, Mission Row, Calcutta, occupied by the appellant. The annual value was ascertained with a view to assess the municipal rates payable in respect of the premises. The appeals raise a common question of law making it necessary to deal with them separately, that question being whether the order of remand made by the High Court at Calcutta to the Court of Small Causes, Calcutta for ascertaining the annual value was justified.

The annual value was ascertained under the Calcutta Municipal Act, 1923. This Act was repealed and replaced by the Calcutta Municipal Act, 1951 as from 1st May, 1952, but as the valuation had originally been made by the respondent Corporation under the repealed Act it is that Act by which the question that arises will have to be determined.

We may at this stage profitably refer to some of the sections in Chapter X of the Act for giving an idea of its scheme regarding the ascertainment of the annual

value. Section 124 provides that a consolidated rate not exceeding twenty-three per cent. on the annual valuation determined under Chapter X of the Act may be imposed by the Corporation upon all lands and buildings in Calcutta. Clauses (a) and (b) of section 127 lay down two mutually exclusive methods for ascertaining the annual value. The method prescribed in clause (a) is applicable where a building had been erected for letting purposes or was ordinarily let and under it the valuation has to be based on the rent which the land or building might reasonably fetch. Clause (b), on the other hand, covers all other cases and provides for the valuation being based on the cost of construction of the building and the value of the land. Section 131 (1) provides that the valuation made under the preceding Municipal Acts shall remain in force for the assessment of the consolidated rate under the Act until such time as the Executive Officer makes a fresh valuation under the Act and that fresh valuation shall have effect for a period of six years and may be revised thereafter at the termination of successive periods of six years. The Executive Officer mentioned is one of the officers of the Corporation appointed under the Act. Section 131 (2) (b) states that

“any land or building the valuation of which has been cancelled on the ground of irregularity may be valued by the Executive Officer at any time during the currency of the period prescribed by sub-section (1), and such valuation shall remain in force for the unexpired portion of such period.”

Sections 136 to 138 lay down the procedure for the making of the valuation and of giving notices in respect thereof to the rate-payers. Under section 139 a rate-payer dissatisfied with the valuation made by the Corporation may lodge with the Corporation his objections to it. Section 140 provides for an order being made by the Executive Officer on these objections after investigation on notice to the rate-payer. Section 141 gives the rate-payer dissatisfied with the order made under section 140 a right to appeal against it to the Court of Small Causes. Under section 142 (3) an appeal lies to the High Court from the decision of the Court of Small Causes under section 141. Section 147 is in these terms :

“When the valuation of any land or building is revised in consequence of an objection made under section 139 or section 146, sub-section (2), or an appeal is preferred under section 141, the revised valuation shall take effect from the quarter in which the first-mentioned valuation would have taken effect, and shall continue in force for the period for which the said first-mentioned valuation was made, and no longer.”

Section 146 is not material for our purposes. Section 164 (1) states that

“When an objection to a valuation has been made under section 139, the consolidated rate shall, pending the final determination of the objection, be paid on the previous valuation.”

Under sub-section (2) of this section “if, when the objection has been finally determined, the previous valuation is altered,” then any sum paid in excess shall be refunded or allowed to be set off against any demand of the Corporation against the rate-payer and any deficiency shall be deemed to be an arrear of rate and recoverable as such. There are sections which provide how the rates are to be realised but no reference to them is necessary. It is enough to say that the rates duly assessed impose a legal liability to pay them which can be enforced by distress or by proceedings in a Court of law.

Now in the present case the Corporation had assessed the annual value of the premises at a certain figure by applying the method prescribed in clause (b) of section 127. The appellant lodged various objections to it under section 139. We are concerned only with two of these objections which were (1) the valuation had been made on a wrong basis as it should have been made by the method prescribed in clause (a) of section 127 and (2), the valuation was in any event unfair and excessive. The Deputy Commissioner of the Corporation, being the officer under the New Act which had then come into force who had replaced the Executive Officer under the Old Act, rejected all these objections except that he reduced the valuation slightly presumably on the ground of excessiveness. The appellant then appealed against the Commissioner's decision to the Court of Small Causes, Calcutta

under section 141. The only point that the appellant raised in that Court was that the valuation was illegal as it had been made under clause (b) of section 127 while it should have been made under clause (a). It did not raise a contention that the valuation as reduced was still excessive and should in any event be further reduced. The Corporation contended that the valuation had properly been made under clause (b) of section 127 and also that the appeal was incompetent as necessary Court-fees had not been paid. The Court rejected both the points and allowed the appeal making the following order :

"The appeal must, therefore, succeed ; and the assessment as made by the respondent body have to be wholly set aside and fresh valuations have to be made in respect of the premises in accordance with the mode prescribed under clause (a) of section 127, starting from the proceedings prescribed in clause (b) of sub-section (2) of section 131 of the Act."

The Corporation then appealed to the High Court at Calcutta under section 142(3) of the Act against the judgment of the Court of Small Causes and raised the same two points it had taken in that Court. Both these points were rejected by the High Court also and the order of the Court of Small Causes was maintained. These points no more survive because the Corporation has not taken any proceeding to challenge the judgment of the High Court. We are not, therefore, called upon to examine the merits of the decision of the Courts below on the applicability of clause (a) of section 127 to the present case or as regards the Court-fees payable by the appellant.

In view of its decision that the valuation should have been made by the method laid down in clause (a) of section 127 the High Court held that "the learned Judge of the Small Causes Court, Calcutta, therefore, rightly cancelled the assessment." Having done this, it observed that the order of the Court of Small Causes directing a revaluation by the Corporation was however infructuous. It is not in dispute that the Corporation could only make a revaluation under section 131 (2) (b), as indeed the Court of Small Causes directed it to do, and that the time limit for doing so prescribed by that section had expired. To prevent the Corporation being deprived of its rates the High Court made an order remanding the case to the Court of Small Causes and directing it to make the valuation itself thereby intending to avoid the difficulty arising out of the application of section 131 (2) (b). It also gave certain consequential directions for the filing of a valuation before that Court by the Corporation and of objections thereto by the appellant and so on. It is this order of remand that the appellant challenges in this Court.

It is not contended that the High Court had any statutory power to make the order of remand but it is said that the High Court had an inherent power to do so. Whether the High Court had the inherent power in a case like this may well be doubted. Learned Counsel for the appellant contended that in any case the order of remand was unjustifiable as it converted the appellant's appeal to the Court of Small Causes into a proceeding wholly alien to what it originally was meant for. It was said that the inherent power of remand could be exercised only for deciding the disputes that arose in the case as it stood ; it could not be exercised for the decision of a matter which the proceedings in the Courts below did not raise, namely, the making of a new valuation on a wholly different basis. These contentions, in our view, deserve serious consideration.

We think that there are other more fundamental objections to the order of remand. The order was made so that a legal liability for rates assessed on the valuation made under it might fasten on the appellant. Indeed the High Court expressly stated that it was making the order so that the Corporation might not be deprived of its rates. The liability for rates is however a statutory liability under the Act ; it is not a liability to be imposed by order of Court. So much is clear and not in dispute. In order that the statutory liability might arise, the valuation had to be made as provided in the statute. Now the Act nowhere states that rates may be fixed on the basis of a valuation made by a Court ; it does not at all contemplate a valuation made by a Court on its own. Such a valuation would be futile and would

create no statutory liability. Therefore, the High Court's order sending the case back to the Small Causes Court, Calcutta, with directions to that Court to ascertain the annual value "if it was intended to allow the Court to make an independent valuation itself, was useless; the valuation made under it would give rise to no liability for rates fixed on the basis of it. It would not be an order which can be set aside."

Though the Act does not empower a Court to make a valuation itself, it does seem to contemplate in sections 147 and 164 a valuation made by the Corporation being revised and a previous valuation altered, by a Court in an appeal. If, therefore, it could be said that the valuation which the Court of Small Causes was made under the order of the High Court would be a revised valuation, that valuation would have been within the statute and the order of the High Court would then have been an effective order. We do not, however, think that that valuation can be said to be a revised or altered valuation. First, the High Court did not direct the Court of Small Causes to revise a valuation or to alter a previous valuation; it directed that Court to make a fresh valuation itself. Secondly, it seems to us, irrespective of how the High Court described the valuation to be made under its order, that that valuation cannot by any stretch of imagination be called a revised valuation or a previous valuation altered. What has happened here is that the previous valuation has been cancelled. That valuation no longer exists. The Court of Small Causes has now to make a valuation of its own on a different basis and on different data. The valuation has now to be made on the basis of the letting value of the premises instead of on the market value of the land and the cost of construction of the building as had previously been done by the Corporation. It would hardly be appropriate to call such a process, the revising of a valuation or the altering of a valuation previously made. Nothing is here revised or altered; what is done is to create a new thing from the start and this without any reference whatsoever to any existing thing. We should suppose that a thing is revised or altered when it is retained with some modifications. Thus when the figures of rent, cost or value on which a valuation is based are altered as excessive, or unfair or a larger depreciation than given is allowed and the total is suitably altered, that would be a case of revising or altering a valuation. The present is a wholly different case. The valuation which the High Court ordered to be made cannot hence be a revised or altered valuation.

It is necessary now to refer to *Royal Asiatic Society of Bengal v. Corporation of Calcutta*¹. In that case, as in the case in hand, the rate-payer had appealed to the Court of Small Causes contending that the valuation had been made by the Corporation by applying a wrong method, namely, clause (a) of section 127. The contention was rejected by the lower Court but upheld by the High Court. The High Court then remanded the case to the Court of Small Causes for a determination of the annual value in terms of clause (b) of section 127. The High Court took the view that in such an appeal the Court of Small Causes had the right to make a revised valuation as contemplated in section 147. Basing itself on that section and section 164 it put its reasoning in this way at page 544:

"the scheme of the Act is that where an assessee is aggrieved by a valuation made by the Corporation and prefers an objection, till the objection is finally adjudicated upon, the consolidated rate has got to be paid on the existing valuation and that after the objection is finally disposed of in appeal, the final valuation fixed will determine the consolidated rate payable and will, in terms of section 147, remain in force for the period for which the first mentioned valuation was made."

With respect, we are unable to agree that this is the scheme of the Act. Where the valuation is in fact revised, the observation quoted would no doubt be fully applicable. It would not apply to other cases. The fallacy of the reasoning lies in the assumption that once there is an appeal, there must always be a revised valuation. There is no warrant for that assumption. We have earlier stated that there is no scope for making a revised valuation where the appeal seeks an annulment

of the existing valuation. Further, neither section 147 nor section 164, on which the reasoning was based, requires a valuation to be revised nor says when that is to be done. They deal only with cases where a valuation has in fact been revised and thereby indicate that there may be cases where the valuation is not revised. In *Governor-General of India in Council v. Corporation of Calcutta*¹, the High Court upheld the order of the Court of Small Causes cancelling a valuation as having been made under the wrong clause of section 127 but did not direct the valuation to be made afresh by that Court. We may also observe here that in the case in hand the High Court referred to the *Royal Asiatic Society's case*², only to support the proposition that it had a power of remand and for no other purpose. It did not say that in all appeals the Court must make a revised valuation.

In considering the scheme of the Act, the *Royal Asiatic Society's case*², further overlooked the fact that the Act required every valuation to be made by the Corporation under sections 131 and 136 to 138 and that it gave the rate-payer a chance of attacking that valuation under section 139 before coming to a Court for ventilating his grievance. These provisions would be ignored if the Court of Small Causes were to make the valuation itself. They indicate that the scheme of the Act was not as stated in that case. There it was also observed that the view taken received support from the observations of S. R. Das, J., in the unreported judgment in *North British and Mercantile Insurance Co., Ltd. v. Corporation of Calcutta*³, mentioned in that case. We think, however, that those observations tend quite the other way for they were *inter alia* that,

"If, however, the Small Causes Court only sets aside the valuation made by the Corporation but does not itself fix the valuation, then section 147 does not apply..... The matter must in such circumstances be left to be governed by section 131 (2) (b)."

S. R. Das, J., clearly contemplated that the Court of Small Causes was not bound to make a revised valuation in all cases. In our opinion, it has not the power to do so in all cases. The same view of the judgment of S. R. Das, J., was taken in *Corporation of Calcutta v. Chandoo Lal Bhai Chand Modi*⁴.

If it was intended by the *Royal Asiatic Society's case*², to hold that it was the appellate Court's power after cancelling a valuation to revise it if it liked, that again would be a view to which we are unable to subscribe. Such a view indeed appears to have been taken by the High Court in the case in hand for it made the order of remand only because the Corporation could not make a valuation any more, the time-limit prescribed for it under section 131 (2) (b) having expired. If the Corporation could make the valuation, presumably the High Court would not have made the order of remand. Now section 131 (2) (b) provides that when a valuation is cancelled on the ground of irregularity, a fresh valuation may be made by the Executive Officer. It would be an unnatural construction of the Act to say that the operation of this provision would depend on the discretion of the appellate Court to proceed or not to proceed to make a valuation itself after cancelling the valuation previously made by the Corporation. We think that in view of this provision, once a valuation is cancelled, a fresh valuation can only be made in terms of it and not in any other way. That is what S. R. Das, J., said and with it we agree. That is another reason for saying that when a valuation is cancelled, the Act does not contemplate a fresh valuation being made by the Court, for if it did so, section 131 (2) (b) would have operation only when the Court decided it to have. We are not prepared to accept as correct an interpretation of the Act leading to such an unnatural result.

While on section 131 (2) (b) we observe that it was not contended that a Court had no power to cancel a valuation; all that was said was that after cancellation the Court must or may proceed to make a fresh valuation. This we have held to be an untenable view. A point was, however, made that section 131 (2) (b)

1. (1947) 51 C.W.N. 517.
2. (1954) 58 C.W.N. 537.

3. Case No. 6 of 1943 unreported.
4. (1953) 57 C.W.N. 882.

applied only to a cancellation on the ground of irregularity, that is, a procedural defect such as, absence of notice, omission to give a hearing, etc. There is, however, no reason to restrict the ordinary meaning of the word "irregularity" and confine it to procedural defects only. None has been advanced. Such a contention was rejected, and we think rightly, in *Corporation of Calcutta v. Chandoo Lal Bhai Chand Modi*¹. That word clearly covers any case where a thing has not been done in the manner laid down by the statute, irrespective of what that manner might be. In principle there would be nothing to justify a special provision like section 131 (2) (b) being made to cover a case of procedural irregularity only.

We can now deal with the reasoning on which the High Court in the present case justified its order of remand. It realised that by making the order it was depriving the appellant of one of its chances to object to the valuation, namely, the chance under section 139, but it felt that by upholding that right of the appellant it would be depriving the Corporation of its rates wholly as the time-limit prescribed by section 131 (2) (b) had expired. It thought that it was faced with two evils and that it would be choosing the lesser of the two if it allowed the Corporation a chance to collect its rates. With great respect, we find this line of reasoning altogether unsupportable. A result flowing from a statutory provision is never an evil. A Court has no power to ignore that provision to relieve what it considers a distress resulting from its operation. A statute must of course be given effect to whether a Court likes the result or not. When the High Court found that section 131 (2) (b) had been attracted to the case, it had no power to set that provision at naught.

It remains to deal with one other argument advanced for the Corporation. It was said that the entire proceeding in connection with the ascertainment of the valuation was one and continuous and its only object was to ascertain the valuation and, therefore, the Court annulling a valuation made on a wrong basis, must have power to make a new valuation itself on the correct basis. We are not impressed by this contention. The conclusion does not follow from the premise. The proceeding for making the valuation, whether it is continuous or not must be in terms of the statute. If the statute does not give the Court the power to make the valuation, it cannot be said to possess that power so that the supposed object may be achieved. Further, the object is not to make a valuation anyhow but to make it only in terms of the Act.

We think we have now considered all the different aspects of the matter that were placed before us by learned Counsel on either side. Our conclusion for the reasons earlier stated is that looked from all points of view, the order of remand is not justifiable in law; it was not within the inherent power of the High Court to remand the case for the doing of a thing which the Act did not countenance. The remand was futile. It offended the Act as it deprived the appellant of one of its statutory rights. The order has to be set aside.

Before concluding we may state that the Corporation had made two valuations of the premises, one called a general valuation for the entire six yearly period mentioned in section 131 (1) and the other an intermediate valuation made later but within that period to have effect for the remainder of the period, on account of certain additional construction in the premises put up since the earlier assessment. Objections had been taken by the appellant to both these valuations under section 139 by independent proceedings and separate appeals filed under section 141 from the order made in each of the proceedings. As earlier stated, the appeals raised the same point. They were, therefore, dealt with in one judgment by both the Courts below, hence the two appeals before us.

In the result we allow these appeals, set aside the judgment of the High Court in so far as the orders for remand are concerned and restore the judgment of the Court of Small Causes. The Corporation will pay the cost of these appeals.

Ramaswami, J.:—These two appeals are brought, by Special Leave, against the judgment of the High Court at Calcutta dated 3rd August, 1959 in appeals from

Original Orders in F.M.A. No. 124 and F.M.A. No. 125 of 1956. The appeals arise out of two valuations made by the Corporation of Calcutta in respect of premises No. 12, Mission Row, Calcutta under the provisions of the Calcutta Municipal Act, 1923 (Bengal Act III of 1923). At the general re-valuation, the disputed premises were assessed to an annual value of Rs. 1,45,354, to come into effect from the second quarter 1949-50, i.e., from 1st July, 1949. The assessment was made under the provision of section 127 (b) of the Calcutta Municipal Act, 1923. The assessee objected to the valuation, both in regard to the quantum and the method of valuation and the Deputy Commissioner No. 1 of the respondent Corporation, though affirming the method of valuation, reduced the amount of assessment to Rs. 1,28,230. Against this order the assessee preferred an appeal to the Presidency Small Cause Court, Calcutta under the provisions of section 183 of the Calcutta Municipal Act, 1951 which had in the meantime come into operation. This appeal was numbered as Municipal Appeal No. 216 of 1954. The general re-valuation of the premises was followed by an intermediate valuation because certain new constructions had been made. At the stage of the intermediate valuation, the annual value was assessed at Rs. 1,46,992 with effect from the first quarter of 1951-52 i.e., from 1st April, 1951 again following the method prescribed under section 127 (b) of the Calcutta Municipal Act, 1923. Upon an objection made by the assessee the valuation was reduced to Rs. 1,29,588 by the Deputy Commissioner No. 1 of the Corporation. The assessee took the matter in appeal to the Presidency Small Cause Court under section 183 of the Calcutta Municipal Act, 1951. This appeal was numbered as Municipal Appeal No. 217 of 1954. In both these appeals the Presidency Small Cause Court considered that the proper procedure was to assess the premises under clause (a) and not clause (b) of section 127 of the Calcutta Municipal Act, 1923. The Presidency Small Causes Court accordingly set aside the assessments and directed fresh assessments to be made in accordance with law. The Corporation took the matter in appeal to the Calcutta High Court which, by its judgment dated 3rd August, 1959, upheld the decision of the Presidency Small Causes Court that the valuation should be fixed under section 127 (a) and not under section 127 (b) of the Calcutta Municipal Act, 1923 and that the valuation already made should be cancelled. The High Court, however, modified the direction of the Presidency Small Causes Court with regard to remand. The High Court ordered that the case should be remanded to the Presidency Small Causes Court for fixing the valuation itself under the provisions of section 127 (a) of the Calcutta Municipal Act, 1923.

The question presented for determination in this case is whether the High Court was right in sending back the case to the Presidency Small Causes Court and directing it to ascertain the annual value under section 127 (a) of the Calcutta Municipal Act for the period in question.

It is necessary at this stage to set out the relevant provisions of the Calcutta Municipal Act, 1923. Section 131 deals with the assessment of the annual valuation and the duration of the assessment. It reads :

"131 (1).....the Executive Officer may make a fresh valuation of the lands and buildings in each such ward under this Act, and the annual value of such lands and buildings in each such ward shall, after such assessment, has been made by the Executive Officer, have effect for a period of six years and may be revised thereafter by the Executive Officer at the termination of successive periods of six years.

(2) Notwithstanding anything contained in sub-section (1) the following conditions shall apply in the several cases hereinafter specified, namely :—

(a)

(b) any land or building the valuation of which has been cancelled on the ground of irregularity or which for any other reason has no annual value assigned to it under this Act may be valued by the Executive Officer, at any time during the currency of the period prescribed in respect of such land or building by sub-section (1) and such valuation shall remain in force, and the consolidated rate shall be levied according to it, for the unexpired portion of such period."

Section 139 provides as follows :

"139. (1) Any person who is dissatisfied with a valuation made under this chapter may deliver at the municipal office a written notice stating the grounds of his objection to such valuation.

(2) Such notice shall be delivered within fifteen days after the publication of the notice referred to in section 137, or after receipt of the notice referred to in section 138, if such notice is received after the publication of the notice referred to in section 137 :

Provided that the Executive Officer may, if he thinks fit, extend the said period of fifteen days to a period not exceeding one month."

Section 140 states :

" 140. (1) All such objections shall be entered, in a register to be maintained for the purpose; and, on receipt of any objection, notice shall be given to the objector of a time and place at which his objection will be investigated.

(2) At the said time and place the Executive Officer or a Deputy Executive Officer shall hear the objection, in the presence of the objector or his agent if he appears, or may, for reasonable cause, adjourn the investigation.

(3) When the objection has been determined, the order passed shall be recorded in the said register, together with the date of such order."

Section 141 reads :

" 141. (1) Any person dissatisfied with the order passed on his objection may appeal to the Court of Small Causes having jurisdiction in the place where the land or building, to the valuation of which the objection was made, is situated.

(2) Such appeal shall be presented to such Court of Small Causes within thirty days from the date of the order passed under section 140, and shall be accompanied by an extract from the register of objections containing the order objected to.

(3) The provisions of Parts II and III of the Indian Limitation Act, 1908, relating to appeals, shall apply to every appeal preferred under this section.

(4) No appeal shall be admitted under this section unless an objection has first been determined under section 140."

Section 142 states :

" 142. (1) Every valuation made by the Executive Officer under section 131 shall, subject to the provisions of sections 139, 140 and 141, be final.

(2) Every order passed by the Executive Officer or Deputy Executive Officer under section 140 shall, subject to the provisions of section 141, be final.

(3) An appeal from a decision made by the Court of Small Causes under section 141 shall lie to the High Court."

Section 147 provides for the period for which the revised valuation is to continue in force. It is to the following effect :

" 147. When the valuation of any land or building is revised in consequence of an objection made under section 139 or section 146, sub-section (2), or an appeal is preferred under section 141, the revised valuation shall take effect from the quarter in which the first-mentioned valuation would have taken effect, and shall continue in force for the period for which the said first-mentioned valuation was made and no longer."

Section 164 makes provision for the payment of the consolidated rate and how far the payment is affected by objections to valuation. It states as follows :

" 164. (1) When an objection to a valuation has been made under section 139, the consolidated rate shall, pending the final determination of the objection, be paid on the previous valuation.

(2) If, when the objection has been finally determined, the previous valuation is altered then—

(a) any sum paid in excess shall be refunded or allowed to be set-off against any present or future demand of the Corporation under this Act, and

(b) any deficiency shall be deemed to be an arrear of the consolidated rate and shall be payable and recoverable as such :

....."

It is manifest from these statutory provisions that the consequences of the revision of valuation and of cancellation of valuation are different. Under section 147 the revised valuation is to date back from the commencement of the period of valuation and is to continue in force for the entire period of 6 years for which the re-valuation is to remain in force, but when a valuation is cancelled on the ground of an irregularity, the Executive Officer, may, at any time during the currency of the period

of valuation, again value the premises under section 131 (2) (b) and such valuation shall be in force and the consolidated rate shall be levied according to it only for the unexpired portion of such period.

On behalf of the appellant-company the Additional Solicitor-General put forward the argument that the present case fell within the purview of section 131 (2) (a) and as the period of re-valuation commencing from 1st July, 1949 was already complete the authorities of the Calcutta Corporation have no power to make a fresh re-valuation under section 131 (2) (b) of the Act. The contrary view was presented on behalf of the respondent-Corporation by Mr. Viswanatha Sastri and it was contended that the present case falls within the purview of section 147 of the Calcutta Municipal Act, 1923 and the revised valuation will relate back, under that section, to the commencement of the period of valuation and will take effect for the entire period of 6 years during which the valuation remained in force. In my opinion, the argument put forward on behalf of the respondents must be accepted as correct. In the present case the valuation has not been finally set aside either by the Presidency Small Causes Court or by the High Court in appeal. The order of the High Court is that the valuation should be set aside because it was not made on the basis of section 127 (a) which was the proper sub-section to be applied. The High Court accordingly set aside the valuation and has remanded the matter to the Presidency Small Causes Court for ascertainment of the annual value under section 127 (a) after allowing the parties to give such further evidence as they choose. It is manifest that the valuation has not yet been finally determined; the matter is still awaiting final adjudication. It is, therefore, not correct to say that there has been a cancellation of the valuation within the meaning of section 131 (2) (b) of the Calcutta Municipal Act, 1923. I am, on the contrary, of the opinion that the case falls under the purview of section 147 of the Municipal Act, 1923 and the present case is a case of revision of the valuation within the meaning of that section and revised valuation when finally determined will take effect retrospectively from the point of time mentioned in that section. In my opinion, the Additional Solicitor-General is unable to make good his submission on this aspect of the case.

It was then contended on behalf of the appellant that the order of remand made by the High Court was illegal because it was beyond the scope of the objection made by the appellant under section 139 of the Calcutta Municipal Act, 1923. It was contended that the appellant has objected only to the basis of the valuation and not to the quantum and, therefore, the order of remand made by the High Court was not in accordance with law. I am unable to accept this argument as correct. The objection made by the appellant under section 139 was an objection to the valuation made by the respondent and whatever be the ground of the objection the primary object of the appellant was to get the valuation set aside. Before the Deputy Commissioner the objection of the appellant was both in regard to the quantum and the method of the valuation and the appellant actually succeeded in getting the amount of valuation reduced to a certain extent. Against the order of the Deputy Commissioner the appellant filed an appeal to the Presidency Small Causes Court under section 141 of the Calcutta Municipal Act. Section 142 states that "every valuation made by the Executive Officer under section 131 shall, subject to the provisions of sections 139, 140 and 141 be final". It is manifest that the subject-matter of the appeal before the Presidency Small Causes Court and also before the High Court was the question of valuation of the disputed premises and not merely in regard to the basis on which the valuation was to be made. I am, therefore, unable to accept the argument on behalf of the appellant that the order of remand made by the High Court is beyond the scope of its appeal.

I am, however, of the opinion that the directions given by the High Court in the judgment under appeal require some modification. In the operative part of the judgment the learned Judges have stated:

"Since it is the duty of the Corporation of Calcutta to determine the annual value at the initial stage and since no such determination or ascertainment has as yet been lawfully made by the Corporation of Calcutta, we direct that the Corporation of Calcutta shall after remand in the first instance

state in writing before the learned Judge of the Calcutta Small Causes Court the valuation ascertained by it under section 127 (a) of the Act of 1923. On such statement being made, the assessee shall be at liberty to amend its grounds of appeals in such manner as it likes. If the amendment introduced brings the case under item 2 of the Notification of 3rd July, 1937, the assessee shall have the liberty to put in the deficit Court fee, if any at all. The learned Judge of the Small Causes Court shall allow the parties to adduce such evidence as they may like and then determine the cases on evidence already on record and such further evidence as may be adduced."

I consider that the direction given in this paragraph should be set aside and in its place there should be an order for remanding the case to the Presidency Small Causes Court for ascertainment by itself of the annual value under the provisions of section 127 (a) of the Calcutta Municipal Act, 1923 after giving the parties adequate opportunity to adduce such evidence as they may like. Subject to this modification I would dismiss the appeals with costs.

ORDER OF THE COURT :—In accordance with the majority judgment, the appeals are allowed. The Corporation will pay the costs of these appeals.

K.G.S.

Appeals allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, K. N. WANCHOO, J. C. SHAH, S.M. SIKRI AND V. RAMASWAMI, JJ.

Paramananda Mahapatra and others

.. *Appellants**

v.

The Commissioner of Hindu Religious Endowments,
Orissa and others

.. *Respondents.*

Orissa Hindu Religious Endowment Act (IV of 1939) section 64 (2)—Suit by person claiming a temple to be a private temple for setting aside order of Commissioner in proceedings under section 64 (2) declaring the temple as public excepted temple—Public if should be impleaded as party to suit—Order 1, rule 8 of the Civil Procedure Code (V of 1908) if applicable of such suit.

In a suit under section 64 (2) of Orissa Religious Endowment Act, by a person claiming a temple to be a private temple for setting aside an order of the Commissioner in proceedings under section 64. (1) declaring the temple "a public excepted temple" the members of the public are not necessary parties and it is not incumbent on the plaintiff to follow the provisions of Order 1, rule 8, Civil Procedure Code. A suit brought under section 64 (2) is not a suit of the nature contemplated by Order 1, rule 8 of the Civil Procedure Code.

Padma Charan v. Commissioner of Hindu Religious Endowments, Orissa, I.L.R. (1961) Cut. 183, Overruled.

Appeals from the judgment and Decrees dated the 22nd November, 1960 and 16th November, 1961 of the Orissa High Court in First Appeals Nos. 53 of 1956 and 78 of 1958 respectively.

B. P. Maheshwari, Advocate, for Appellant (in C.A. No. 310 of 1963).

P. K. Chatlerjee, Advocate, for Appellants (in C.A. No. 121 of 1964).

S. V. Gupte, Solicitor-General of India (R. N. Sachthey, Advocate, with him), for Respondent No. 1 (in both the appeals).

The Judgment of the Court was delivered by

Ramaswami, J.—(In C.A. No. 310 of 1963). This appeal is brought by a certificate on behalf of the plaintiff against the judgment and decree of the Orissa High Court dated 22nd November, 1961.

In the suit which is the subject-matter of this appeal the plaintiff alleged that his ancestor—Dayanidhi Mahapatra—constructed a temple out of his own funds and established a family deity and made endowments for the maintenance of Soba-Puja of the deity. After the death of Dayanidhi the plaintiff became the Manager and Shebait of the family deity. The case of the plaintiff was that the temple and the

10th September, 1965.

endowments were never dedicated to the public nor had the public any kind of right in the temple or the endowed properties, but that respondent No. 1 acting under the provisions of section 49 of the Orissa Hindu Religious Endowment Act (hereinafter referred to as the 'Act') realised a sum of Rs. 386 as the annual contribution from the plaintiff. Consequently Sri Baman Mahapatra filed an application under section 64 (1) of the Act for a declaration that the temple in question was a private one and did not fall within the purview of the Act. On 1st November, 1953 respondent No. 1 rejected the contention of the plaintiff and declared the temple as a "public excepted temple" within the meaning of section 6 (5) of the Act and appointed members of the plaintiff's family as the hereditary trustees. Thereafter Sri Baman Mahapatra filed a suit in the Court of Subordinate Judge, Puri, under section 64 (2) of the Act for a declaration that the order passed by respondent No. 1 was illegal and should be set aside. Respondent No. 1 filed a written statement in that suit and after hearing the evidence on behalf of both the parties the Subordinate Judge held that the temple was a private temple belonging to the family of the plaintiff and defendants 2 and 3 and not a public excepted temple as erroneously held by respondent No. 1 in his order dated 1st November, 1953. Aggrieved by this judgment, respondent No. 1 filed an appeal before the Orissa High Court which allowed the appeal on the preliminary ground that the suit was not maintainable as the plaintiff had not impleaded the public in accordance with the requirements of Order 1, rule 8 of the Civil Procedure Code. The High Court took the view that the omission to implead the public in a suit under section 64 (2) of the Act was fatal and the suit as framed was, therefore, not maintainable and should be dismissed. In taking this view the High Court followed its previous decision in *Padma Charan v. Commissioner, Hindu Religious Endowments, Orissa*¹.

The question of law involved in this appeal is whether the High Court is right in its view that in a suit brought under section 64 (2) of the Act the public should be impleaded as necessary parties under Order 1, rule 8 of the Civil Procedure Code.

Section 6 (13) of the Act defines a "temple" as,

"a place, by whatever designation known, used as a place of public religious worship and dedicated to or for the benefit of or used as of right by, the Hindu community, or any section thereof, as a place of religious worship."

Section 6 (5) defines an "excepted temple" to mean and include

"a temple the right of succession to the office of trustee or the offices of all the trustees (where there are more trustees than one) whereof has been hereditary, or the succession to the trusteeship whereof has been specially provided for by the founder."

Section 64 of the Act states :

"64. (1) If any dispute arises as to whether an institution is a math or temple as defined in this Act or whether a temple is an excepted temple such dispute shall be decided by the Commissioner.

(2) Any person affected by a decision under sub-section (1) may, within one year, institute a suit in the Court to modify or set aside such decision ; but subject to the result of such suit, the order of the Commissioner shall be final."

The right of instituting a suit conferred by section 64 (2) on any person affected by the decision of the Commissioner is a statutory right and there is nothing in that section which makes it incumbent upon the plaintiff to make the public as party-defendants to the suit or to take recourse to the procedure prescribed under Order 1, rule 8, Civil Procedure Code. It was conceded by the Solicitor-General on behalf of respondent No. 1 that there is also nothing in the Rules framed under section 52 of the Act requiring the Commissioner to give public notice and invite objections from the members of the public interested in the temple in a proceeding under section 64 (1) of the Act. If the Commissioner is not required to give public notice or to grant a hearing to members of the public before making an order under section 64 (1) of the Act, there is no reason why the person affected by the decision of the Commissioner should be compelled to implead members of the public as party-defendants in a suit brought under section 64 (2) of the Act. In our opinion, the suit brought

under section 64 (2) is not a suit of the nature contemplated by Order 1, rule 8 of the Civil Procedure Code. Having regard to the scheme and object of the Act it is manifest that the Commissioner represents the interest of the public and he is the only person who is entitled to take proceedings on behalf of the religious and charitable trust and individual members of the public have no *locus standi* in the matter. Reference may be made in this connection to section 54 of the Act which states :

"54. (1) The Commissioner or any person having interest and having obtained the consent of the Commissioner may institute a suit in the Court to obtain a decree—

- (a) to recover possession of property comprised in a religious endowment ;
- (b) appointing or removing the trustee of a math or excepted temple or of a specific endowment attached to a math or excepted temple ;
- (c) vesting any property in a trustee ;
- (d) declaring what proportion of the endowed property or of the interest therein shall be allocated to any particular object of the endowment ;
- (e) directing account and enquiries ; or
- (f) granting such further or other relief as the nature of the case may require.

(2) Sections 92 and 93 and rule 8 of Order 1 of the First Schedule of the Code of Civil Procedure, 1908, shall have no application to any suit claiming any relief in respect of the administration or management of a religious endowment and no suit in respect of such administration or management shall be instituted, except as provided by this Act.

(3) All suits or other legal proceedings by or against the Commissioner under this Act shall be instituted by or against him in his name."

The principle underlying the section is based, to some extent, upon the principle of English law for enforcement of charitable trust in the interest of general public. In English law the Crown as *parens patriae* is the constitutional protector of all property, subject to charitable trusts, such trusts being essentially matters of public concern—*A. G. v. Brown*¹; and the Attorney-General, who represents the Crown for all legal purposes, is accordingly the proper person to take proceedings on this behalf and to protect charities—*Eyre v. Countess of Shaftsbury*². Whenever an action is necessary to enforce the execution of a charitable purpose, to remedy any abuse or misapplication of charitable funds, or to administer a charity, the Attorney-General is the proper plaintiff, whether he is acting alone *ex-officio* as the officer of the Crown and as such the protector of charities, or *ex relatione*, that is to say at the request of a private individual who thinks that the charity is being or has been abused. The same principle is, to some extent, the basis of different legislative enactments in our country with regard to enforcement of public religious and charitable trusts. We are, therefore, of opinion that the High Court was in error in holding that in the suit brought by the plaintiff under section 64 (2) of the Act the members of the public were necessary parties and it was incumbent on the plaintiff to follow the provisions of Order 1, rule 8, Civil Procedure Code, and the view of the High Court on this point should be overruled.

For the reasons expressed we hold that this appeal should be allowed and the judgment and decree of the High Court of Orissa in First Appeal No. 53 of 1956 dated 22nd November, 1961, should be set aside and the appeal should be remanded to the High Court for being dealt with and decided in accordance with law. Both the parties will bear their own costs up to this stage.

In *Civil Appeal No. 121 of 1964*.—This appeal is brought by a certificate against the judgment and decree of the High Court of Orissa dated 16th November, 1961, and the question of law involved in this appeal is identical with the one involved in *Civil Appeal No. 310 of 1963*. For reasons given in that case we allow this appeal set aside the judgment and decree of the Orissa High Court in First Appeal No. 78 of 1958 dated 16th November, 1961, and order that the appeal should go back in remand to the High Court for being dealt with and determined in accordance with law. Both the parties will bear their own costs up to this stage.

K.S.

Appeals allowed and remanded.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—J. C. SHAH AND V. RAMASWAMI, JJ.

Commissioner of Income-tax, Madras

... Appellant*

v.

Prithvi Insurance Co., Ltd.

... Respondent.

Income-tax Act (XI of 1922), section 24 (2)—Loss—Set-off—Same business—Criterion—Inter-connection, interlacing interdependence and unity—Closure of one business without affecting the other business—Not a decisive test—Assessee a company carrying on life insurance and general insurance business—Allowed under the memorandum of association—Common administrative organisation and common expenses—Loss in life business against profits in general business—Set-off—Allowable—Same business.

The assessee, a public limited company, carried on in the relevant years of account, business of insurance, life and general. For the assessment year 1951-52 the Department and the Tribunal held that the life insurance business and general business carried on by the assessee were distinct and separate and the loss carried forward from the previous year in respect of the life insurance business could not be set-off under section 24 (2) against the profits of the general insurance business. But the High Court answered the reference in favour of the assessee. The Revenue appealed.

Held, that the life insurance business and the general insurance business constitute the same business within the meaning of section 24 (2) of the Act and hence the unabsorbed losses incurred in the earlier years in the life insurance business are available to be set-off against the profits from the general insurance business.

Whether two or more lines of a business may be regarded as the same business or different businesses depends not upon the special methods prescribed by the Income-tax Act for computation of the taxable income, but upon the nature of the businesses, the nature of their co-organisation, management, source of the capital fund utilised, method of book-keeping and a host of other related circumstances which stamp them as the same or distinct. The test is if there is any inter-connection, any interlacing, any interdependence and any unity at all embracing the two businesses. The inter-connection, interlacing, interdependence and unity may be furnished by the existence of common management, common business organization, common administration, common fund and a common place of business.

The test whether one of the businesses can be closed without affecting the conduct of the other business is not a decisive test in determining whether the two businesses constitute a same business within the scope of section 24 (2). If one business cannot conveniently be carried on after the closure of the other, there would be a strong indication that the two businesses constitute the same business, but no decisive inference may be drawn from the fact that after the closure of one business another may conveniently be carried on.

Held on facts : the assessee was entitled to carry on the life insurance business and the general insurance business under its memorandum of association, and the businesses were attended to by the branch managers and the agents without any distinction, there was one common administrative organization and the expense incurred in connection with the business both for administration, and for heads of expenditure such as salary of the staff, postage, staff welfare fund and general charges, were common.

Appeals by Special Leave from the Judgment and Order, dated the 3rd May, 1963, of the Madras High Court in Tax Case No. 196 of 1960.

R. M. Hazarnavis (Gopal Singh and R. N. Sachthey, Advocates, with him), for Appellant.

S. Swaminathan and M. S. Narasiman, Advocates, for Respondents.

The Judgment of the Court was delivered by

Shah, J.—The respondent, a public limited company, carried on in the relevant years of account, business of insurance—life and general. In each of the calendar years 1944 to 1948 relating to the assessment years 1945-46 to 1950-51, the company

suffered loss in the life insurance section, and made profit in the general insurance section. Till the assessment year 1950-51 the loss suffered in the life insurance section was allowed by the Revenue authorities to be carried forward and set-off under section 24 (2) of the Indian Income-tax Act 1922, against profits from the general insurance section in the subsequent year. In the proceedings for assessment for the assessment year 1951-52 the Income-tax Officer held that the life insurance business and the general insurance business carried on by the company were "distinct and separate" and the loss carried forward from the previous year in respect of life insurance business could not be set-off under section 24 (2) against the profit of the general insurance business. The Appellate Assistant Commissioner and the Tribunal confirmed the view of the Income-tax Officer. The Tribunal referred the following question to the High Court of Madras under section 66 (1) of the Income-tax Act :

"Whether the unabsorbed losses incurred by the assessee in the earlier years in its life insurance business are available to be set-off against its profits from general insurance business for the assessment years 1951-52 to 1954-55?"

The High Court answered the question in the affirmative. With certificate granted by the High Court, these appeals have been preferred by the Commissioner of Income-tax.

The order of the Income-tax Appellate Tribunal summarises the reasons which persuaded the Departmental Authorities to reject the claim of the company. The Tribunal states :

"The business of life insurance possesses peculiar characteristics which do not exist in respect of other insurance businesses. Firstly, the life insurance policies are not contracts of indemnity; they are forms of investments. Other classes of insurance business are contracts of indemnity. Secondly, the contract in the general insurance is generally annual, while in the case of life business the risk continues until death. Unlike general insurance contracts, the life contract, is made once and for all. The general insurance contracts, are in law, fresh contracts entered into at the time of each renewal. Thirdly, life business is controlled by principles essentially variant from those which control the general insurance business. Fourthly, the life premia do not represent the life profits nor can the total amount of claims arising in one year be set-off as a deduction. Fifthly, the law under which life business is carried on is quite different from the laws governing general business; and lastly, assessable profits of life business shall be computed separately from those of the general business, the consequence of which would be that the carry forward of loss of life business cannot be had against the profit of general business".

Tax payable by an assessee under the head "Profits and gains of business, profession or vocation" is normally computed under section 10 (1) of the Income-tax Act, 1922, after making allowances mentioned in sub-section (2) of section 10. But sub-section (7) of section 10 provides that notwithstanding anything to the contrary contained in sections 8, 9, 10, 12 or 18 of the Act, the profits and gains of any business, of insurance and the tax payable thereon shall be computed in accordance with the rules contained in the Schedule to the Act. The Schedule is headed "Rules for the computation of the profits and gains of insurance business". By rule 1 it is provided that in the case of any person who carries on, or at any time in the preceding year carried on, life insurance business, the profits and gains of such person from that business shall be computed separately from his income, profits or gains from any other business. By rule 2, it is provided:

"The profits and gains of life insurance shall be taken to be either—

(a) the gross external incomes of the preceding year from that business less the management expenses of that year, or

(b) the annual average of the surplus arrived at by adjusting the surplus or deficit, disclosed by the actuarial valuation made in accordance with the Insurance Act, 1938 (IV of 1938), in respect of the last inter-valuation period ending before the year for which the assessment is to be made, so as to exclude from it any surplus or deficit included therein which was made in any earlier inter-valuation period and any expenditure other than expenditure which may under the provisions of section 10 of this Act be allowed for in computing the profits and gains of a business,

whichever is the greater :

Provided

*

*

*

*

Rules 3 and 4 lay down the methods of computing the surplus for the purpose of rule 2. Rule 5 is a definition clause. Rule 6 deals with the computation of profits.

d gains of any business of insurance other than the life insurance, and provides that the profits and gains of any business of insurance other than life insurance shall be taken to be the balance of the profits disclosed by the annual accounts, copies of which are required under the Insurance Act, 1938, to be furnished to the Controller of Insurance after adjusting such balance so as to exclude from it expenditure other than expenditure which may under the provisions of section 10 of the Act be allowed for in computing the profits and gains of a business. Rule 7 also deals with the computation of profits and gains of companies carrying on dividing societies or assessment business. Rule 8 deals with the computation of profits of non-resident insurance companies having branches in the taxable territory. Rule 9 provides that the profits of any business carried on by a mutual insurance association or by a co-operative society shall be computed in accordance with the Rules.

Computation of the assessable income of an assessee carrying on business of life insurance or general insurance has therefore to be made in accordance with the Rules and not by determining the profits under sub-section (1) of section 10 after making allowances under sub-section (2). Where an assessee sustains a loss of profits or gains in any year under any of the heads mentioned in section 6, he is entitled to have the amount of the loss set-off against his income, profits or gains under any other head in that year (section 24 (1)). Therefore in determining the assessable profits, the net balance under the same head mentioned in section 6 has to be taken into account, and if there be loss under a head of income (subject to the special exception relating to admissibility of loss from speculative business), that loss is to be set-off against the income, profits or gains under any other head. Sub-section (1) does not however deal with carry forward to the following year of loss suffered by the assessee as a result of computing the total income from all the heads. That is dealt with under sub-section (2). Section 24 (2) as it stood at the material time provided :

"Where any assessee sustains a loss of profits or gains in any year, being a previous year not later than the previous year for the assessment for the year ending on the 31st day of March, 1940 *any business, profession or vocation* and the loss cannot be wholly set-off under sub-section 1, *so much of the loss as is not so set-off or the whole loss where the assessee had no other head of income* shall be carried forward to the following year and set-off against the profits and gains, if any, of the assessee from the same business, profession or vocation for that year; * * *

The words italicised were substituted by the Income-tax Amendment Act (XXV of 1953), for the words "under the head 'profits and gains of business, profession or vocation'" and "the portion not so set-off" respectively. The relevant time loss which could not be set-off in the year of account may be carried forward to the following year, but it could be set-off against the profits and gains of the assessee from "the same business, profession or vocation." If the loss is carried forward from the previous year and sought to be set-off was not from the same business, profession or vocation, it could not be set-off under section 24 (2). If there was no income or profits from the same business in the subsequent year, the loss could not be set-off, but had to be carried forward in the next year following, subject to the restriction placed in that sub-section.

The question whether the business of life insurance and the business of general insurance could be regarded as the same business assumes importance in this case, since it affects the right to carry forward the loss suffered in the life insurance business and to set-off against the profit of the company in the general insurance business of the subsequent year is clearly in issue. If the life insurance business and the general insurance business were not the "same business" within the meaning of section 24 (2), the loss in the life insurance business which could not be set-off against income from other businesses of the company and sources of income, could not be carried forward and set-off in the year following against the income from the general insurance business.

Counsel for the Commissioner contended that life insurance business and general insurance business were separate businesses and he relied in support of that conten-

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JOURNAL SECTION.

ARTICLES.

	PAGES-
The Retiring and Incoming Chief Justices of India ..	1
Indian Presidency—by Dr. Vishnu Narain Srivastava, M.A., PH.D., Prof. and Head of the Department of Political Science, D.A.V. College, Kanpur ..	3
Hindu Law in Historical Perspective—by R. P. Anand, LL.M., Delhi ..	11
Matrimonial Ceremonies among Hindus—by Kailash Chandra Srivastava —(<i>Bhaurai S. Lokhande v. State of Maharashtra</i> , A.I.R. 1965 S.C. 1564) B.Sc., LL.M., Lecturer in Law, University of Lucknow, Lucknow ..	35
Changing Concept of Right to Property—by P. G. Jain, LL.M., Lecturer, Law Faculty, University of Allahabad ..	46
Governmental Contracts—by Surya Kumar, LL.M., Lecturer in Law, University of Lucknow, Lucknow ..	60
The Definition of a Hindu—by Dr. J. Duncan M. Derrett, Professor of Oriental Laws in the University of London ..	67
Drafting the Delegated Legislation—by Brahma Bharadvaja ..	75
Doctrine of Renvoi in India—by S. R. Bhansali, LL.M., Lecturer in Law, University of Law College, Jaipur ..	85
Matrimonial Cruelty in Hindu Law—by Ramesh Chandra, M.A., LL.M., Lecturer in Law, University of Allahabad ..	105

JOURNAL SUPPLEMENT.

The late Dr. C. P. Ramaswami Aiyar ..	i
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JUDGES OF THE SUPREME COURT OF INDIA.

(1st July, 1966 to 31st December, 1966.)

Chief Justice :

The Hon'ble Mr. Koka Subba Rao.

Puisne Judges :

The Hon'ble Mr. Justice K. N. Wanchoo.

„ „ M. Hidayatullah.

„ „ J. C. Shah.

„ „ S. M. Sikri.

„ „ R. S. Bachawat.

„ „ V. Ramaswamy.

„ „ J.-M. Shelat.

„ „ V. Bhargava (from 8th August, 1966).

„ „ G. K. Mitter (from 29th August, 1966).

„ „ C. A. Vaidialingam (from 10th October, 1966).

„ „ Raghubar Dayal (*Ad hoc* Judge with effect from August, 1966 to 11th October, 1966).

The Attorney-General of India :

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Shri S. V. Gupte.

The Additional Solicitor-General of India :

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TABLE OF CASES REPORTED.

	PAGES.
Abdul Azeez <i>v.</i> Ramanathan Chettiar	714
N. Agarwalla <i>v.</i> Jahanara Begum	531
Ajoy Kumar Mukherjee <i>v.</i> Local Board of Barpeta	153
M. A. Akbar Kashani <i>v.</i> United Arab Republic	25
N. Ambalal Mody <i>v.</i> Narayan Row, C.I.T., Bombay	401
Anowar Hussain <i>v.</i> Ajoy Kumar Mukherjee	1
S. Banerjee <i>v.</i> S. Agarwala	111
Barium Chemicals, Ltd. <i>v.</i> Company Law Board	623
Bhaiya Lal <i>v.</i> Harikishan Singh	77
Bharat Singh <i>v.</i> Bhagirathi	53
Bhikari <i>v.</i> State of U.P.	281
Biram Prakash <i>v.</i> Narendra Dass	220
Bishambhar Nath Kohli <i>v.</i> State of U.P.	337
Biswambhar Roy <i>v.</i> G. K. Paul	747
Bombay Labour Union <i>v.</i> M/s. International Franchises (P.), Ltd.	477
Brundaban Nayak <i>v.</i> Election Commission of India	166
Bundelkhand Motor Transp. Co. <i>v.</i> Behari Lal Chaurasia	37
Cachar Chah Sramik Union <i>v.</i> Management of the Tea Estate	461
Chattanatha Karayalar <i>v.</i> Central Bank of India, Ltd.	317
Cochin State Power & Light Corpn. <i>v.</i> State of Kerala	204
C.W.T. <i>v.</i> Imperial Tobacco Co.	544
Dayawati <i>v.</i> Inderjit	784
Divisional Personnel Officer <i>v.</i> S. Raghavendrachar	535
Durga Prasad <i>v.</i> H. R. Gomes	665
Durgadas Shirali <i>v.</i> Union of India	661
Dwarka Nath <i>v.</i> Lal Chand	95
Edwingson Barch <i>v.</i> State of Assam	679
Everest Apartments Co-operative Housing Society Ltd. <i>v.</i> State of Maharashtra	498
General Assurance Society Ltd. <i>v.</i> Chandumull Jain	101
Ghansham Das <i>v.</i> Debi Prasad	749
Godavari S. Parulekar <i>v.</i> State of Maharashtra	716
Gopalan <i>v.</i> Commissioner for H.R. & C.E.	794
Gulab Bai <i>v.</i> Puniya	265
P. C. Gulati <i>v.</i> Lajya Ram	42
Gurbinder Singh <i>v.</i> Lal Singh	157
Gurcharan Das Chadha <i>v.</i> State of Rajasthan	139
Gyasi Ram <i>v.</i> Brijbhushandas	752
Harinagar Sugar Mills Co. <i>v.</i> M. W. Pradhan	126
N. S. Z. Hossain Mirza <i>v.</i> Satyendra Nath Bose	208
Indian Chemical Products Ltd. <i>v.</i> State of Orissa	393
Jhingan <i>v.</i> State of U.P.	742
Joint Chief Controller <i>v.</i> M/s. Aminchand Mutha	612
Kaluram Onkarmal <i>v.</i> Baidyanath Gorain	145
Kalyani Stores <i>v.</i> State of Orissa	367
M/s. Kamala Mills Ltd. <i>v.</i> State of Bombay	591
Kamal Narain Sarma <i>v.</i> Dwarka Prasad Mishra	34
Kedar Pandey <i>v.</i> Narain Bikram Sah	579

	PAGES.
Kehar Singh <i>v.</i> Dewan Singh	363
K. G. Khosla & Co. <i>v.</i> Dy. Commr. of Comm. Taxes	703
Kishanchand Lunidasing Bajaj <i>v.</i> C.I.T., Bangalore	20
Krishnan Nambissan <i>v.</i> State of Kerala	676
Lala Shri Bhagwan <i>v.</i> Shri Ram Chand	295
Laliteshwar Prasad <i>v.</i> Bateshwar Prasad	241
Maddanappa <i>v.</i> Chandramma	310
Malludora <i>v.</i> Seetharatnam	356
Management of Brooke Bond, India (P.) Ltd. <i>v.</i> Their Workmen	473
Management of Utkal Machinery Ltd. <i>v.</i> Workman, Santi Patnaik	470
Management of the Syndicate Bank Ltd. <i>v.</i> Workmen	488
Milkhiram (India), Private Ltd. <i>v.</i> Chamanlal Broi.	606
Mohammed Meera Lebbai <i>v.</i> Tirumalaya Gounder	50
Mongibai Hariram <i>v.</i> State of Maharashtra	379
Morvi Mercantile Bank Ltd. <i>v.</i> Union of India	6
Muralidhar Himatsingka <i>v.</i> C.I.T., Calcutta	735
Nand Kishore Saraf <i>v.</i> State of Rajasthan	194
A. Narayanappa <i>v.</i> B. Krishnappa	490
Nathulal <i>v.</i> State of M.P.	421
Nawab Usmanali Khan <i>v.</i> Sagar Mal	285
Nirmala Bala Ghose <i>v.</i> Balai Chand Ghose	426
S. D. G. Pandarasannadhi <i>v.</i> State of Madras	81
Punjab Sikh Regular Motor Service <i>v.</i> R.T. Authority	354
Purshottam H. Judye <i>v.</i> V. B. Potdar	457
Radha Rani Bhargava <i>v.</i> Hanuman Prasad Bhargava	587
Raja Gopala Rao <i>v.</i> Sitharamamma	179
M/s. Ram Chand & Sons Sugar Mills <i>v.</i> Khanhayalal Bhargava	731
Ram Manohar Lohia <i>v.</i> State of Bihar	549
Rama Iyer <i>v.</i> Sundaresa Ponnappoondar	576
Ramaswami Chettiar <i>v.</i> Muthukrishna Aiyar	711
Ramesh <i>v.</i> G. Motilal Patni	762
Ratan Lal <i>v.</i> State of Maharashtra	133
R. G. Reddy <i>v.</i> Addl. Custodian, Evacuee Property	782
Md. Reza Debstani <i>v.</i> State of Bombay	334
M. R. Ruparel <i>v.</i> State of Maharashtra	87
Sadanandan <i>v.</i> State of Kerala	725
Sahoo <i>v.</i> State of U.P.	172
Salem-Erode Electricity Distribution Co. (P.) Ltd. <i>v.</i> Employees Union	480
Sales Tax Officer <i>v.</i> M/s. Shiv Ratta G. Mohatta	161
R. K. Shankar Jagtap <i>v.</i> S. B. Sakham Jedhe	302
Shankaranarayana <i>v.</i> State of Mysore	329
Shastri Yagnapurushdasji <i>v.</i> M. B. Vaishya	502
Sheodan Singh <i>v.</i> Daryao Kunwar	768
G. A. Shodan <i>v.</i> State of Gujarat	528
South Asia Industries (P.) Ltd. <i>v.</i> Sarup Singh	69
State Bank of Patiala <i>v.</i> Ram Parkash	522
State of Bihar <i>v.</i> Rambalak Singh	707
State of Bombay <i>v.</i> Jagmohandas	359
State of Bombay <i>v.</i> Nurul Latif Khan	184
State of Gujarat <i>v.</i> J. Bhagwanbhai	723
State of J. & K. <i>v.</i> Caltex (India) Ltd.	755
State of Kerala <i>v.</i> Sami Iyer	467
State of M.P. <i>v.</i> V. P. Sharma	231
State of Madras <i>v.</i> Govindarajulu Naidu	213
State of Madras <i>v.</i> Kunnakudi Melamatam	175
State of Punjab <i>v.</i> Amar Singh Harika	777
State of U.P. <i>v.</i> Agarwal	673

	PAGES.
State of U.P. <i>v.</i> R. Sharma Vaidya	200
State of U.P. <i>v.</i> Srinarayan	190
State of W.B. <i>v.</i> Nripendra Nath Bagchi	59
Tek Bahadur Bhujil <i>v.</i> Debi Singh Bhujil	290
K. H. Thacker <i>v.</i> M/s. The Saran Engineering Co. Ltd.	196
Thakur Ram <i>v.</i> State of Bihar	438
Union of India <i>v.</i> Sukumar Pyne	227
University of Mysore <i>v.</i> Gopala Gowda	306
Vaithilingam Pillai Charities <i>v.</i> Vijayavalli Achi	259
Mrs. Veeda Menezes <i>v.</i> Ibrahim Khan	720
G. Veerayya <i>v.</i> N. S. Chowdhary	789
Venkatesh Narahar Katti <i>v.</i> H. K. Mulla	346
Venkateswara Rao <i>v.</i> Government of A.P.	270
Vijay Singh <i>v.</i> State of Maharashtra	324
War Profits-tax Commissioner <i>v.</i> M/s. B. Balchand	397
Workmen, Motipur Sugar Factory <i>v.</i> Motipur Sugar Factory	445
H. H. Yeshwant Rao <i>v.</i> Commissioner of W.T., Bangalore	411

TABLE OF CASES CITED.

	PAGES.
A	
Abdul Majid v. Dr. Samiruddin, 62 Cal. W.N. 555 ..	146
Abdur Rehman v. Raghubir Singh, (1949) 51 P.L.R. 119 ..	365
R.M.A.R.A. Adaikappa Chettiar v. Ra. Chandrasekhara Thevar, (1947) L.R. 74 I.A. 264 : (1948) 1 M.L.J. 41 ..	74
Agency Company v. Short, (1888) L.R. 13 A.C. 793 ..	160, 161
Aikman v. Akiman, 3 Mad. Q.H.L.C. 854 ..	583
Ajodhya Prasad v. Bhawani Shankar, A.I.R. 1957 All. 1 ..	58
Ajudhia Pershad Ram Pershad v. Sham Sunder, A.I.R. 1947 Lah. 13 ..	497
Akker Pralhad v. Ganesh Pralhad, I.L.R. (1945) Bom. 216 (F.B.) ..	182
Dr. Akshaibar Lal v. Vice Chancellor, (1961) 3 S.C.R. 386 ..	652
Anandilal Bhagchand v. Chandrabai, (1924) I.L.R. 48 Bom. 203 ..	182
Ancona v. Rogers, (1876) 1 Ex. D. 285 ..	670
Angurbala v. Debabrata, (1951) S.C.R. 1125 : (1951) S.C.J. 394 ..	437
Arjun Singh v. Mohindra Kumar, (1964) 5 S.C.R. 946 : A.I.R. 1964 S.C. 993 ..	733
Asghar Ali Mohammad Ali v. Commissioner of Income-tax, (1964) 52 I.T.R. 962 ..	547
Ashgar Ali Khan v. Ganesh Das, 34 M.L.J. 12 : L.R. (1917) 44 I.A. 213 ..	774
Ashworth v. Munn, (1880) 15 Ch. D. 363 ..	496
Assam Oil Company Limited v. Its Workmen, (1961) 1 S.C.J. 137 ..	472, 473
The Associated Cement Companies Limited Bhupendra Cement Works v. P.N. Sharma, (1966) 1 S.C.J. 786 ..	298
Associated Cement Staff Union v. Associated Cement Company, (1964) 1 L.L.J. 12 : A.I.R. 1964 S.C. 914 ..	486
Atmaram Vaidya's Case, (1951) 1 M.L.J. 389 : (1951) S.C.J. 208 : (1951) S.C.R. 167 ..	651
Attorney-General v. Sillem, 11 E.R. 1220 ..	788
Attorney-General for Ontario v. Reciprocal Insurers, L.R. (1924) A.C. 328 ..	331
B	
Babburu Basamayya & Son others v. Babbum Guravayya, I.L.R. (1952) Mad. 173 : (1951) 2 M.L.J. 176 ..	316
Babu Barkya Thakur v. The State of Bombay, (1961) 2 S.C.J. 392 : (1961) 1 S.C.R. 128. ..	236
Bai Kashi v. Jannadas, (1912) 14 Bom. L.R. 547 ..	182
Bai Nagubai v. Bai Monghibai, (1926) I.L.R. 50 Bom. 604 ..	181
Bal Gangadhar Tilak v. Shrinivas Pandit, (1915) L.R. 42 I.A. 135 : 29 M.L.J. 34 : 17 Bom. L.R. 527 ..	58
Bangalore Woollen Cotton and Silk Mills v. Bangalore Corporation, (1961) 3 S.C.R. 698 : A.I.R. 1962 S.C. 1,263 ..	372
The Bangalore Woollen, Cotton and Silk Mills, Co., Ltd. v. The Corporation of the City of Bangalore, (1962) 1 S.C.J. 214 : (1961) 3 S.C.R. 707 : A.I.R. 1962 S.C. 562 ..	372, 373
Banno Bibi v. Mehdi Hussain, (1889) I.L.R. 11 All. 375 ..	269
Bareilly Electricity Supply Company Limited v. Sirajuddin, (1960) 1 L.L.J. 556 ..	490
B. Basavalingappa v. D. Munichinnappa, (1965) 2 S.C.J. 153 ..	80
Bassu Kuar v. Dhum Singh, (1889) L.R. 15 I.A. 211 : I.L.R. 11 All. 47 ..	714
Beck v. Binks, L.R. (1949) 1 K.B. 250 ..	121
Bellamkonda Kanakayya, <i>In re</i> , (1942) 2 M.L.J. 172 : I.L.R. (1943) Mad. 381 ..	94
Bengal Immunity Company, Ltd. v. The State of Bihar, (1955) S.C.J. 672 : (1955) 2 S.C.R. 603 : (1955) 2 M.L.J. (S.C.) 168 ..	594, 595, 603, 758, 759
Bennett v. Ogston, (1930) 15 T.C. 374 ..	409
Bennett and White (Calgary) Limited v. Municipal District of Sugar City No. 5. L.R. (1951) A.C. 786 ..	761
Bental v. Burn, (1824) 3 B & C. 423 ..	16
Bentham Mills Spinning Company, <i>In re</i> , (1879) L.R. 11 Ch. D. 900 ..	396
Bhahatarini v. Ashalata, L.R. (1943) 70 I.A. 57 : (1943) 2 M.L.J. 70 ..	437
Bhagauti Din v. Bhagwat, A.I.R. 1933 Oudh 531 ..	775
Bhagwat Singh v. State of Rajasthan, A.I.R. 1964 S.C. 444 ..	288
Bharat Kala Bhandar, Ltd., v. Municipal Committee, (1965) 2 I.T.J. 657 : (1965) 2 S.C.J. 741 ..	602
Bharat Sugar Mills Limited v. Shri Jai Singh, (1962) 3 S.C.R. 684 ..	451, 452
Bhimraj Panalal v. Commissioner of Income-tax, (1957) 32 I.T.R. 289 : I.L.R. (1957) 36 Pat. 920 : A.I.R. 1957 Pat. 638 ..	516

Bhogilal Chunilal Pandya v. The State of Bombay, (1959) S.C.J. 240 : (1959) 1 M.L.J. (S.C.) 101 : (1959) 1 An. W.R. (S.C.) 101 : (1959) M.L.J. (Cr.) 105 : (1959) 1 S.C.R. (Supp.) 310	174
Bhupender v. Rajeshwar, L.R. (1931) 58 I.A. 228 : (1931) 61 M.L.J. 632	315
Bijoy Gopal Mukherji v. Krishna Mahishi Debi, L.R. 34 I.A. 87 : 17 M.L.J. 154 : (1907) I.L.R. 34 Cal. 329	590
Bikhray Jaipuria v. Union of India, (1962) 2 S.C.J. 479 : (1962) 2 S.C.R. 880	251
Sm. Bimal Kumari v. Asoka Mitra, A.I.R. 1955 Cal. 402	609
Bishambhar Nath v. Nawab Imdad Ali Khan, (1890) L.R. 17 I.A. 181	288
The Boots Pure Durg Company (India), Limited v. Their Workmen, B.G.G. Part 1 dated 26-1-1956	478
Bowes v. Hope Life Insurance and Guarantee Company, (1865) 11 H.L.C. 388	128
Brahmadeo Singh v. Deomani Missir, C.A. 130 of 1955 decided on 15-10-62	589
Brijbhushan v. State of Delhi, (1950) 2 M.L.J. 431 : (1950) S.C.J. 425 : (1950) S.C.R. 605	568
Brij Indar Singh v. Kansli Ram, (1917) L.R. 44 I.A. 218 : 33 M.L.J. 486	304
Burdett Coutts v. Inland Revenue Commissioners, (1960) 1 W.L.R. 1027	497
M/s. B indalkhand Motor Transport Company v. Bshari Lal Chaurasia, A.I.R. 1966 S.C. 455	358

C

Cairneross v. Lorimer, 3 H.L.C. 829	314
The Calcutta Gas Company (Proprietary) Limited v. The State of West Bengal (1963) 1 S.C.J. 106 : (1962) 3 S.C.R. (Supp.) 106	275
Canara Industrial and Banking Syndicate Limited v. Commissioner of Income-tax, (1964) 51 I.T.R. 479	547
Carltona Limited v. Commissioners of Works, (1943) 2 All E.R. 560	555
Carr v. London and N.W. Ry. Co., L.R. 10 C.A. 307	567
Carson v. Cheneyney's Executors, (1960) 38 T.C. 240	314
Cavendish Bentinck v. Fenn, (1887) L.R. 12 C.A. 652	409
The Cement Marketing Company of India v. The State of Mysore, (1964) 2 S.C.J. 287 : (1963) 14 S.T.C. 175 : (1963) 3 S.C.R. 777 : A.I.R. 1963 S.C. 980	657
The Central Bank of India Limited v. Hartford Fire Insurance Company Limited, (1965) 1 Comp.L.J. 226 : (1965) 1 S.C.J. 498 : A.I.R. 1965 S.C. 1288	706
Chandulal Khushalji v. Award Bin Umar Sultan Nawaz Jung Bahadur, (1897) I.L.R. 21 Bom. 351	109, 110, 111
Charandas Haridas v. Commissioner of Income-tax, (1960) S.C.J. 929 : (1960) 39 I.T.R. 202 : (1960) 3 S.C.R. 296 : (1960) 62 Bom. L.R. 910 : A.I.R. 1960 S.C. 910	33
R.R. Chari v. The State of Uttar Pradesh, (1951) S.C.J. 302 : (1951) 1 M.L.J. 617 : (1951) S.C.R. 312	740
Chatturbhuj Vithaldas Jasani v. Moreswar Parashram, (1954) S.C.J. 315 : (1954) S.C.R. 817	46
	244 to 247, 251, 257 and 258
Chetu v. Jawand Singh, 107 P.R. of 1913	365
Chimanbai Rama v. Ganpat Jagannath, (1958) 60 Bom. L.R. 975 : I.L.R. (1958) Bom. 917 : A.I.R. 1959 Bom. 425	349
Chimanlal Popatlal v. B.M. Choksey, Appeal No. 12 of 1957	622
Chinna Mahali Mudali v. Nanjappa Goundan, (1946) 1 M.L.J. (N.I.C.) 1	182
Chitturi Venkataratnam v. Subba Rao, (1926) 51 M.L.J. 410 : I.L.R. 49 Mad. 738	496
City Corporation v. Antony, I.L.R. (1962) 1 Ker. 430	90, 91
The Collector of Masulipatam v. Cavalry Venkata Narrainapali, (1861) 8 M.I.A. 529	247, 251
Collector of Sultanpur v. Raja Jagdish Prasad Sahi, C.A. No. 1014 of 1963, decided on 5-11-1964	192
The Commissioner, H.R.E. v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, (1954) S.C.R. 1005 : (1954) S.C.J. 335 : (1954) M.L.J. 596	437
Commissioner for Motor Transport v. Antill Ranger & Company (P.), Ltd. State of New South Wales v. Edmund T. Lennon Pty. Ltd., (1956) 3 A.E.R. 106	694
Commissioner for the Port Trust of Calcutta v. General Trading Corporation Limited, A.I.R. 1964 Cal. 290	12
Commissioner of Income-tax v. Abdul Rahim & Company, (1965) 1 I.T.J. 462 : (1965) 1 S.C.J. 434 : (1965) 55 I.T.R. 651 : A.I.R. 1965 S.C. 1,703	741
Commissioner of Income-tax v. Ajax Products Limited, (1965) 1 I.T.J. 623 : (1965) 1 S.C.J. 659	406
Commissioner of Income-tax v. Amarchand N. Shroff, (1963) 1 S.C.J. 411 : (1963) 1 S.C.R. (Supp.) 690	409
— v. Cocanada Radhaswami Bank, (1965) 2 I.T.J. 346 : (1965) 2 Comp. L.J. 120 : (1965) 2 M.L.J. (S.C.) 36 : (1965) 2 An. W.R. (S.C.) 36 : (1965) 2 S.C.J. 489	405
— v. Express Newspapers Limited, (1964) 2 I.T.J. 221 : (1964) 2 S.C.J. 405 : (1964) 8 S.C.R. 188	402, 406
— v. Rathinasabhapathy Mudaliar, (1964) 51 I.T.R. 204	547
— v. Sakuntala and others, (1962) 1 S.C.R. 788 : (1961) 43 I.T.R. 352	24

—v. Sir Mohamed Yusuf Ismail, (1944) 12 I.T.R. 8 : I.L.R. (1944) Bom. 230 : 46 Bom. L.R. 108 : A.I.R. 1944 Bom. 160 ..	546, 547
—v. The Tribune Trust, (1948) 2 M.L.J. 14 : L.R. 74 I.A. 306 : I.L.R. (1947) Lah. 809 ..	501
Commissioner of Income-tax, Bombay v. Sitaldas Tirathdas, (1961) 1 M.L.J. (S.C.) 128 : (1961) 1 An. W.R. (S.C.) 128 : (1961) 1 S.C.J. 472 : (1961) 41 I.T.R. 367 : (1961) 2 S.C.R. 634 : A.I.R. 1961 S.C. 728 ..	738, 739
Commissioner of Income-tax, Punjab v. Laxmi Trading Company, (1953) 24 I.T.R. 173. Commissioner of Income-tax, West Bengal v. Kalu Babu Lal Chand, (1960) S.C.J. 311 : (1960) 1 An. W.R. (S.C.) 81 : (1960) 1 M.L.J. (S.C.) 81 : (1960) 1 S.C.R. 320 : (1959) 37 I.T.R. 128 : A.I.R. 1959 S.C. 1289 ..	739
Cook v. Ward, (1877), L.R. 2 C.P.D. 255 ..	741
A.P.S.R.T. Corporation v. Satyanarayan Transports, A.I.R. 1965 S.C. 1303 ..	640
Cox v. Hickman, (1960) 8 H.L.Cas. 268 ..	649
Crawshay v. Collins, (1808) 15 Ves. 218 ..	739
	494

D

Dafedar Niranjan Singh v. Custodian, Evacuee Property, (1962) 1 S.C.R. 214 : A.I.R. 1961 S.C. 1425 ..	342
Dahyabhai Chhaganbhai Thakkar v. State of Gujarat, A.I.R. 1964 S.C. 1563 ..	282
Dale v. Hamilton, (1846) 5 Hare 369 on appeal to (1847) 2 Ph. 266 ..	495, 496
Darby v. Darby, (1856) 61 E.R. 992 ..	494
Dasaratha Rama Rao v. State of Andhra Pradesh, (1961) 1 M.L.J. (S.C.) 63 : (1961) 1 An. W.R. (S.C.) 63 : (1961) 1 S.C.R. 310 ..	332
Datti Parisi Nayudu v. Datti Bangaru Nayudu, (1869) 4 M.H.C.R. 204 ..	181
Dery v. Peek, (1889) L.R. 14 A.C. 337 ..	657
Dhanvantrai Balwantrai Desai v. State of Maharashtra, (1964) 1 S.C.J. 133 : (1964) M.L.J. (Cr.) 65 ..	743
Dhanwatay v. Commissioner of Income-tax, (1957) 32 I.T.R. 682 ..	741
Doucet v. Geoghegan, L.R. 9 Ch. Div. 441 ..	584
Dubbin City Distiller Limited v. Doherty, L.R. (1914) A.C. 823 ..	16
Sri Dulap Singh v. State through Sri Harnandan Singh, A.I.R. 1944 All. 163 ..	441
Duncan Fox & Company v. North and South Wales Bank, L.R. 6 A.C. 1 ..	321, 322
Dwarka Das v. State of J. & K. (1957) S.C.J. 133 : (1956) S.C.R. 948 : (1957) M.L.J. (Cr.) 58 : A.I.R. 1957 S.C. 164 ..	574

E

Eames v. Home Insurance Company, 24 L.Ed. 298 ..	108
Election Commission, India v. Saka Venkata Subba Rao and Union of India Intervenor, (1953) S.C.J. 293 : (1953) 1 M.L.J. 702 : (1953) S.C.R. 1144 ..	168
C.I. Emden v. State of Uttar Pradesh, (1960) S.C.J. 368 : (1960) S.C.R. 592 : (1960) M.L.J. (Cr.) 228 ..	744
Emperor v. Shibnath Banerjee, (1943) F.L.J. (F.C.) 151 : (1943) 2 M.L.J. 468 : (1944) F.C.R. 1 : A.I.R. 1943 F.C. 75 ..	629, 650
Emperor v. Shibnath Banerjee, (1945) L.R. 72 I.A. 241 : (1945) 8 F.L.J. 222 : 50 C.W.N. 25 : (1945) F.C.R. 195 : (1945) 2 M.L.J. 325 ..	629, 651
Estate and Trust Agencies Limited v. Singapore Improvement Trust, L.R. (1937) A.C. 898 ..	652
European Banking Company, In re, ex parte Baylis, (1866) L.R. 2 Eq. 521 ..	132

F

Fakharuddin Mohamed Ahsan v. The Official Trustee, I.L.R. (1881) 8 Cal. 178 : L.R. 8 I.A. 197 ..	316
Farina v. Home, 16 M. & W. 119 ..	16
Featherstonhaugh v. Fenwick, (1810) 17 Ves. 298 ..	494
Fieldrank Limited v. Stein, (1961) 3 A.E.L.R. 681 ..	610
Firm and Illuri Subbayya Chetti & Sons v. The State of A. P. (1961) 1 S.C.R. 752 : (1964) 1 An.W.R. (S.C.) 5 : (1963) 2 S.C.J. 725 : (1964) 1 M.L.J. (S.C.) 5 ..	597, 601, 605
The Firm of Dolatram Dwardas v. The Bombay Baroda and Central India Railway Company, (1914) I.L.R. 38 Bom. 659 ..	12
Firm Malik Des Raj v. Firm Piara Lal, A.I.R. 1946 Lah. 65 ..	58
Firm Ram Sahaymall v. Bishwanath Prasad, A.I.R. 1963 Pat. 221 ..	407
Food Inspector v. Parameswaram, 1962 (1) Cr.L.J. 152 ..	91
Forbes v. Steven, L.R. (1870) 10 Eq. 178 ..	495
Foster v. Hole, (1800) 5 Ves. 308 ..	491, 496
Frailay v. Charlton, L.R. (1920) 1 K.B. 147 ..	121
Francis v. Yiewsley and West Drayton Urban Dist. Council, L.R. (1957) 2 Q.B. 136 ..	602
Fuller's Contract, In re, L.R. (1933) Ch. D. 652 ..	497

G

K.G. Gajapati Narayan Deo v. The State of Orissa, (1953) S.C.J. 592 : (1954) S.C.R. 1.	331, 333
Ganesh v. Lal Behary, L.R. (1936) 63 I.A. 448 : 71 M.L.J. 740	437
Ganges Manufacturing Company v. Saurjmul, (1880) I.L.R. 5 Cal. 669	314
Garikapati Veerana v. Subbaiah Choudhury, (1957) S.C.J. 439 : (1957) 2 M.L.J. (S.C.) 1 : (1957) 2 An.W.R. (S.C.) 1 : (1957) S.C.R. 488	51
The Gauntlet, (1872) L.R. 4 P.C. 184	113
General Accident Insurance Corporation v. Cronk, (1901) 17 T.L.R. 233	108
General Company for Promotion of Land Credit, <i>In re</i> , (1870) L.R. 5 Ch. D. 380	128
Mrs. Gertrude Oates v. Mrs. Millicent D' Silva, A.I.R. 1933 Patna 78	776
Ghansham Singh v. Bhola Singh, I.L.R. (1923) 45 All. 509	775
Gian Chand v. The State of Punjab, (1962) 1 S.C.R. (Supp.) 364 : A.I.R. 1962 S.C. 496	670
Godavari Shamrao Parulekar v. State of Maharashtra, (1965) 2 S.C.J. 523 : (1965) M. L.J. (Crl.) 765 : (1964) 5 S.C.R. 446	718
Gokal and Company (P.), Limited v. Assistant Collector of Sales Tax (Inspection), (1960) S.C.J. 671 : (1960) 2 S.C.R. 852	114, 164
Gold Hill Mines, <i>In re</i> , (1883) L.R. 23 Ch. D. 210	133
Gopal Saran Narain Singh v. Income-tax Commissioner, (1935) L.R. 62 I.A. 207 : 69 M.L.J. 190	408
Gopala Chetty v. Vijayaraghavachariar, L.R. (1922) 1 A.C. 488 : I.L.R. 45 Mad. 378	496
Gopisetti Veeraswami v. Sagiraju Seetharama Kantayya, (1926) 51 M.L.J. 394	215
Gray v. Smith, (1889) 43 Ch. D. 208	496
Greene v. Secretary of State, L.R. (1942) A.C. 234	651
Guest, Keen, Williams Private Limited v. P. J. Sterling, (1960) 1 S.C.R. 348 : (1960) S.C.J. 281 : A.I.R. 1959 S.C. 1279	487
Gulabchand Daulatram v. Survajirao Ganpatrao, A.I.R. 1950 Bom. 401	714
Gullapalli Nageswara Rao v. Andhra Pradesh State Road Transport Corporation, (1959) S.C.J. 967 : (1959) 2 An.W.R. (S.C.) 156 : (1959) 2 M.L.J. (S.C.) 156 : (1959) 1 S.C.R. (Supp.) 319	332
Gummalapura Taggana Matada Kotturuswami v. Setra Veerayya, (1959) 1 S.C.R. (Supp.) 968 : (1959) S.C.J. 437 : (1959) 1 M.L.J. (S.C.) 158 : (1959) 1 An. W.R. (S.C.) 158	589
Gur Narain Das v. Gur Tahal Das, (1952) S.C.J. 305 : (1952) 2 M.L.J. 251 : (1952) S.C.R. 869	181
K.N. Guruswamy v. State of Mysore, (1955) 1 S.C.R. 305 : (1954) S.C.J. 644	196

H

Habiba Bibi v. Rani Ranjan Mullick, A.I.R. 1937 Cal. 207	532
Hajon Manick v. Bur Singh, (1884) I.L.R. 11 Cal. 17	31
Hanskumar Kishanchand v. The Union of India, (1959) S.C.J. 603 : (1959) S.C.R. 117	77
Hansraj Gupta v. Official Liquidator, Dehar Dun Mussoorie Electric Tramway Company, L.R. (1932) 60 I.A. 13 : 64 M.L.J. 403	287
Hanuman Kamat v. Hanuman Mandur, (1892) L.R. 18 I.A. 158 : I.L.R. 19 Cal. 123	714
Hanuman Prasad v. Indrawati, A.I.R. 1958 All. 304	589
Harbhajan Singh v. State of Punjab, (1966) 1 S.C.J. 753 : (1966) M.L.J. (Crl.) 435 : A.I.R. 1966 S.C. 97	47, 745
Hargovind Kuari v. Dharam Singh, (1884) I.L.R. 6 All. 329	182
Hariprasad Shivshankar Shakla v. A. D. Divikar, (1957) S.C.J. 83 : (1957) S.C.R. 121	410
Harsukh Saragqi v. Mashulal Khemani, A.I.R. 1957 Assam 22	532
Hem Singh v. Basant Das, L.R. 63 I.A. 180 : A.I.R. 1936 P.C. 93	74
W. T. Henley's Telegraph Works Company Limited v. Gorakhpur Electric Supply Company, Limited, A.I.R. 1936 All. 840	132, 133
The High Court, Calcutta v. Amal Kumar Roy, (1963) 1 S.C.R. 437 : A.I.R. 1962 S.C. 1704	541
Howrah Trading Company v. Commissioner of Income-tax, (1959) S.C.J. 1133 : (1959) 2 S.C.R. (Supp.) 448	22, 24, 25
Hunooman Persahd Pandey v. Mussumat Babooce Munraj Koonwerce, (1854-57) 6 M.L.A. 243	226
Hurrish Chunder Chowdhury v. Kali Sundari Debia, (1882) L.R. 10 I.A. 4	269
Huth v. Clarke, (1890) 25 Q.B.D. 381	718

I

Income-tax Appellate Tribunal v. B. P. Byramji & Company, (1946) 14 I.T.R. 174 : I.L.R. (1946) Nag. 387 : (1946) N.L.J. 25 : A.I.R. 1946 Nag. 188	546
Income-tax Officer v. Arvind N. Mafatal and others, (1963) 1 S.C.J. 625	24
Indar Singh v. Mr. Gurdevi, A.I.R. 1930 Lah. 897	366
Indian Hume Pipe Co. v. The Workmen, (1960) S.C.J. 550 : (1960) 2 S.C.R. 32	466
Indian Iron & Steel Co. v. Their Workmen, (1958) S.C.R. 667 : (1958) S.C.J. 285 : (1958) M.L.J. (Crl.) 266	451

	PAGES-
Indira Sohanlal v. Custodian of Evacuee Property, (1956) S.C.J. 171 : (1955) 2 S.C.R. 1117	342, 344
Inglis v. Robertson and Boxter, L.R. (1898) A.C. 616	15
Ittavra Mathai v. Varkey Varkey and another, (1964) 1 S.C.R. 495 : A.I.R. 1964 S.C. 907	52
J	
Jacobs v. Booth's Distillery Company, (1901) 85 L.T. 262	610, 611
Jagannath Prabhaskar Joshi v. Varadkar, (1960) 63 Bom.L.R. 1 : A.I.R. 1961 Bom. 244	615, 621, 622
Jagat Singh v. Ishar Singh, I.L.R. 11 Lah. 645	366
Jai Kaur v. Sher Singh, (1961) 2 S.C.J. 62 : (1960) 3 S.C.R. 975	364
Japan Cotton Trading Company Limited v. Jajodia Cotton Mills Limited, (1926) I.L.R. 54 Cal. 345	132
Jawala Singh v. Mt. Lami and others, 14 P.R. of 1884	365
Jethalal Bhawanji Thaker v. Prabhakar Sudashiv Talatule, A.I.R. 1956 Nag. 193	764
Jodrell v. Jodrell, (1868-69) 7 E. C. 461	461
Joharmal v. Tejam Jagrup, (1893) I.L.R. 17 Bom. 235	495, 496
Joint Controller v. H. V. Jain, (1959) 2 M.L.J. 308 : (1959) M.L.J. (CrI.) 737 : I.L.R. (1959) Mad. 850	613, 615, 618, 621
M. V. Joshi v. M. U. Shimpi, (1961) 2 S.C.J. 571 : (1961) 2 M.L.J. (S.C.) 145 : (1961) 2 An.W.R. (S.C.) 145 : (1961) 3 S.C.R. 986 : (1961) M.L.J. (CrI.) 649	94
Julius v. Bishop of Oxford, (1880) 5 A.C. 214	358, 501
K	
B. M. Kamdar, <i>In re</i> , I.L.R. (1946) Bom. 8 : 47 Bom.L.R. 742 : A.J.R. 1945 Bom. 442	402, 406, 407
S. Kameswaramma v. Subramanyam, (1959) 1 An.W.R. 12 : A.I.R. 1959 A. P. 269	184
Kamala Mills Case, (1965) 16 S.T.C. 613 : (1965) 57 I.T.R. 643 : A.I.R. 1965 S.C. 1942	360, 361, 362
Kaniram Hazarimull v. Commissioner of Income-tax, (1955) 27 I.T.R. 294	741
Kasibhatla Satyanarayana Sastrulu v. Kasibhatla Mallikarjuna Sastrulu, A.I.R. 1960 A.P. 45	316
Khemkore v. Umashankar, (1873) 10 Bom. H.C.R. 381	182
Khetramohan Baral v. Rasananda Misra, A.I.R. 1962 Orissa 141	776
King Emperor v. Sibnath Banerjee, (1945) 2 M.L.J. 325 : (1945) 72 I.A. 241	718
<i>In re</i> , Kingston Cotton Mill, Company No. 2, L.R. (1896) 2 Ch. 279	657
Kirkness v. John Hudson and Company, L.R. (1955) A.C. 696 : (1955) 2 A.E.R. 345	410
Krishnareddi v. Subbamma, (1900) I.L.R. 24 Mad. 136	441, 443
Kureshi v. Argus Footwear Limited, A.I.R. 1931 Rang. 306	132
Kydd v. Liverpool Watch Committee, L.R. (1908) A.C. 327	75
L	
Mst. Lachhmi v. Bhulli, I.L.R. (1927) Lahore 384	776
Ladli Prasad Jaiswal v. Karnal Distillery Company Limited, (1964) 2 S.C.J. 12 : (1964) 1 S.C.R. 270	76
Lakhi Narayan Das v. Province of Bihar, (1950) 1 M.L.J. 760 : (1950) S.C.J. 32 : (1949) F.C.R. 693	568
Lal Chand Chauglhuri v. Bogha Ram, A.I.R. 1938 Lah. 819	353
Laxman Purshottam Pimpurkar v. State of Bombay, (1964) 1 S.C.J. 180 : (1964) 1 S.C. R. 200	297, 301
Le Lievre v. Gould, L.R. (1893) 1 Q.B. 491	657
Liversidge v. Anderson, L.R. (1942) A.C. 206	651, 653, 654
Lloyd's Banking Company v. Ogle, 1 Ex. D. at p. 264	611
London County Council v. Wood, L.R. (1897) 2 Q.B. 482	203
London and Globe Finance Corporation Limited, <i>In re</i> , L.R. (1903) 1 Ch. 728	657
M	
Machindar v. The King, (1949-50) F.C.R. 827	651
Macoun, <i>In re</i> , L.R. (1904) 2 K.B. 700	130
Madhav Laxman Vaikunthe v. State of Mysore, (1962) 1 S.C.J. 134 : (1962) 1 S.C.R. 886 : A.I.R. 1962 S.C. 8	537, 538, 539, 540
Mahaliram Santhalaia v. Commissioner of Income-tax, (1958) 33 I.T.R. 261 : A.I.R. 1958 Cal. 394	740
Maharaja Jagadindra Nath Roy Bahadur v. Rani Hamanta Kumari Debi, (1904) L.R. 31 I.A. 203	437
Maharajkumar Kamal Singh v. Commissioner of Income-tax, (1959) S.C.J. 230 : (1959) 1 M.L.J. (S.C.) 92 : (1959) 1 An.W.R. (S.C.) 92 : (1959) 1 S.C.R. (Supp.) 10	546, 547
Mahendra v. Darsan, (1952) I.L.R. 31 Pat. 446	51
S. Majumdar v. A. Brahmachari, CrI. A. No. 21 of 1960, decided on 14th September, 1964	674, 675

Makhan Singh Tarsikka v. The State of Punjab, A.I.R. 1964 S.C. 381	553, 559, 561, 663
K.V. Mallayya v. T. Ramaswami and Company, (1963) 2 S.C.J. 483 : (1963) 2 An. W.R. (S.C.) 110 : (1963) 2 M.L.J. (S.C.) 110	130
Management of Hindustan Commercial Bank Limited v. Bhagwan Dass, A.I.R. 1965 S.C. 1142	705
Manihar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal, (1962) 1 S.C.R. (Supp.) 450 : A.I.R. 1962 S.C. 527	733
Manohar Vinayak v. Laxman Anandrao, A.I.R. 1947 Nagpur 248	775
Mask & Company, In the case of, L.R. (1940) 67 I.A. 222 : I.L.R. (1940) Mad. 599 : (1940) 2 M.L.J. 140	602
Manks v. Whiteley, L.R. (1912) 1 Ch. 735	321
Mangal Singh v. Tilak Singh, 61 P.R. of 1894	365, 367
Maung Ba Jhaw v. Ma Pin, (1934) L.R. 61 I.A. 158 : 66 M.L.J. 404	74, 75
McEman v. Smith, (1849) 2 H.L.C. 309	16
Meenakshi Mills Limited v. A.V. Viswanatha Sastri, (1955) S.C.R. 787 : 26 I.T.R. 713 : (1955) 1 M.L.J. (S.C.) 21 : (1955) S.C.J. 62	660
Mela Singh v. Gurdas, (1922) I.L.R. 3 Lah. 362	364
Mercantile Bank of India Limited v. Central Bank of India Limited, (1937) 65 I.A. 75 : I.L.R. (1938) Mad. 360 : (1938) 1 M.L.J. 268	19
D.K. Merchant v. State of Bombay, (1958) 60 Bom. L.R. 1183 : I.L.R. (1958) Bom. 1224	137
Mohan Chowdhury v. The Chief Commissioner, (1964) 3 S.C.R. 442 : A.I.R. 1964 S.C. 173	552, 559, 574
Mohd. Amin v. Wakil Ahmed, (1952) S.C.R. 1133 : (1952) S.C.J. 39 : (1953) 1 M.L.J. 6	316
Mohendra Nath v. Shamsunnassa, (1941) 21 C.L.J. 157	160
Monahai v. Bhupendra, I.L.R. (1932) 70 Cal. 452	437
Moorhouse v. Lord, 10 H.L. Cas. 272	584
Motilal Manekchand v. Commissioner of Income-tax, (1957) 31 I.T.R. 735 : I.L.R. (1957) Bom. 495 : 59 Bom. L.R. 499 : A.I.R. 1957 Bom. 291	739
Muhammad Nain-ul-Jah Khan v. Ishan Ullah Khan, (1892) I.L.R. 14 All. 226	269
Muhammad Siddiq v. Muhammad Nuh, (1930) I.L.R. 52 All. 604	714
Mukerjee (K.C.) v. Mst. Ramratan, (1935) L.R. 63 I.A. 47 : 70 M.L.J. 105 : A.I.R. 1936 P.C. 49	788
Municipal Board v. Ram Gopal, (1940) 42 Cal. L.J. 243	93
Municipal Officer, Aden v. Abdul Karim, I.L.R. (1904) 28 Bom. 292	766
Munro v. Munro, 7 Cl. & Fin. 876	583
Murlidhar v. State of U.P., A.I.R. 1964 All. 148	301
Murugesam Pillai v. Manickavasaka Pandara, 32 M.L.J. 369 : (1917) L.R. 44 I.A. 98 : I.L.R. 40 Mad. 402	225
Musti Venkata Jagannadha v. Musti Veerabhadrayya, (1921) 41 M.L.J. 1 : I.L.R. 48 I.A. 244 : I.L.R. 44 Mad. 643	333
Muthuswamy Jagavera Yettappa Naicker v. Venkateswara Yettappa, (1868) 12 M.I.A. 203	181

N

Nahar Singh v. State, I.L.R. (1952) 2 All. 152	441
Nahari v. Shankar, (1950) S.C.R. 754	772
Nakkunda Ali v. Jayaratne, L.R. (1951) A.C. 66	653
Nalla Baligadu, In re, (1953) 2 M.L.J. 1 : A.I.R. 1953 Mad. 801	441
Naranjan Singh Nathawan v. The State of Punjab, (1952) S.C.J. 111 : (1952) 1 M.L.J. 733 : (1952) S.C.R. 395	718
Narayan Bharathi v. Laving Bharathi, (1878) I.L.R. 2 Bom. 140	181
S. A. L. Narayan Row v. Ishwarlal Bhagwandas, (1965) 2 I.T.J. 264 : (1965) 2 S.C.J. 359	765
Narayanāsawami Bahadur v. Boda Thammayya, (1930) M.W.N. 945	215
Narottam Saran v. State of U. P., A.I.R. 1954 All. 232	301
National Permanent Building Society, Re, (1869) L.R. 5 Ch. D. 309	128
National Sewing Thread Co., Ltd. v. James Chadwick and Brothers Limited, (1953) S.C.J. 509 : (1953) 2 M.L.J. 215 : (1953) S.C.R. 1028	73
National Telephone Company Limited v. Postmaster-General, L.R. (1913) A.C. 546	74
Nawab Bahadur of Murshidabad v. Karnani Industrial Bank Limited, 61 M.L.J. 208 : L.R. (1931) 58 I.A. 215	283
New Marine Coal Company v. The Union of India, A.I.R. 1964 S.C. 152	246
Niladri Sahu v. Mahant Chaturbhuj Das, 51 M.L.J. 822 : (1926) L.R. 53 I.A. 253 : A.I.R. 1926 P.C. 112	226
Ningareddi v. Lakshmvava, (1901) I.L.R. 26 Bom. 163	182

O

Obedur Rahman v. Darbari Lal, A.I.R. 1927 Lahore 1	775
Official Assignee of Madras v. Mercantile Bank of India Limited, (1934) L.R. 61 I.A. 416 : I.L.R. 58 Mad. 181 : 68 M.L.J. 26	10, 12, 13, 17, 18, 19
Ormond Investment Co. v. Betts, L.R. (1928) A.C. 143	410

Padam Sen v. State of Uttar Pradesh, (1961) 2 S.C.J. 79 : (1961) M.L.J. (Crl.) 405 : (1961) 2 An.W.R. (S.C.) 22 : (1961) 2 M.L.J. (S.C.) 22 : (1961) 1 S.C.R. 884 : A.I.R. 1961 S.C. 218	732
Padmabati Dasi v. Dhar, (1910) I.L.R. 37 Cal. 296	648
Pakala Narayana v. R., (1939) L.R. 66 I.A. 66 : (1939) 1 M.L.J. 756 : I.L.R. 18 Pat. 234	173
Panchanada Velan v. Vaitthinatha Sastrigal, I.L.R. (1906) 29 Mad. 333 : 16 M.L.J. 63	776
Pande Har Narayan v. Surja Kunwari, L.R. 43 I.A. 143	434
Pannalal Binraj v. Union of India, (1957) 31 I.T.R. 565 : (1957) S.C.R. 233	649
Parshotam Lal Dhingra v. Union of India, (1958) S.C.J. 217 : (1958) S.C.R. 828 : A.I.R. 1958 S.C. 36	538, 539, 540
Partap Singh v. State of Punjab, A.I.R. 1964 S.C. 72	650, 652
Patrick and Lyou, <i>In re</i> , L.R. (1933) Ch. 786	657
Pearce Dusadh v. Emperor, (1943) F.L.J. (F.C.) 187 : (1940) 1 M.L.J. 305 : (1944) F.C.R. 61	692
Phulbari Tea Estate v. Its workmen, (1960) 1 S.C.R. 32	451, 452
Pickard v. Sears, (1832) A. & E. 469	314
Point of Ayr Collieries Ltd. v. Lloyd George, (1943) 2 All E.R. 546	568
Ponnuswami Udayar v. Santhappa, A.I.R. 1963 Mad. 171	316
Pratapmall Rameshwar v. Chunnilal Jahuri, A.I.R. 1933 Cal. 417	353
Prem Raj Brahmin v. Bhani Ram Brahmin, I.L.R. (1946) 1 Cal. 191	497
Probbhat Chandra Barusa v. King Emperor, (1930) 59 M.L.J. 814 : L.R. 57 I.A. 228	404, 408
Probat Kumar Mitter v. Commissioner of Income-tax, (1961) 41 I.T.R. 624 : (1961) 3 S.C.R. 37 : (1962) 2 M.L.J. (S.C.) 119 : (1963) 2 S.C.J. 496 : (1962) 2 An.W.R. (S.C.) 119 : A.I.R. 1961 S.C. 1019	738
Prosunno Kumari Debya v. Golabchand Baboo, (1875) L.R. 2 I.A. 145	226
Province of Bombay v. K. S. Advani, (1950) S.C.J. 451 : (1950) 2 M.L.J. 703 : (1950) S.C.R. 621	287
The Provincial Government of Madras (now A. P.) v. J. S. Basappa, (1964) 15 S.T.C. 144	601
Public Prosecutor v. Dada Haji Ebrahim Helair, (1952) 2 M.L.J. 565	94
Public Prosecutor v. Narayan Singh, (1944) M.W.N. (Crl.) 132	94
Public Prosecutor v. Ramachandrayya, (1948) 1 M.L.J. 117 : (1948) M.W.N. (Crl.) 32	94
The Punjab National Bank Ltd. v. Its workmen, (1960) 1 S.C.R. 806 : (1960) S.C.J. 999	451
Purchase v. Stainer's Executors, (1951) 32 T.C. 367	409
Pyx Granite Company Limited v. Ministry of Housing and Local Government and others, L.R. (1960) A.C. 260	602

Q

Queen v. Burah, (1878) L.R. 3 A.C. 889	692
Quilter v. Mapleson, (1882) L. R. 9 Q.B.D. 672	788

R

R. v. Neath Canal Navigation, 40 L.J.M.C. 197	751
Rachepalli Atchamma v. Yerragunta Rani Reddy, I.L.R. (1957) A.P. 152	316
Radhakrishnan v. Sridhar, I.L.R. (1950) Nag. 532 : A.I.R. 1950 Nag. 177	51, 52
Radha Mohan Pathak v. Upendra Patowary, A.I.R. 1962 Assam 71	77
Rafiquenessa v. Lal Bahadur Chetti, (1964) 2 S.C.J. 562 : (1964) 6 S.C.R. 876	748
Rahimtolla v. Nizam of Hyderabad, L.R. (1958) A.C. 379	28
Rai Bahadur Diwan Badri Das v. The Industrial Tribunal, (1963) 2 S.C.J. 193 : (1963) 3 S.C.R. 930 : A.I.R. 1963 S.C. 630	485, 486
Raja Narayanlal Bansilal v. Maneck Phiroz Mistry, (1961) 1 S.C.J. 353 : (1961) M.L.J. (Crl.) 208 : (1961) 1 M.L.J. (S.C.) 73 : (1961) 1 An.W.R. (S.C.) 73 : (1960) Comp. Cas. 644 : (1961) 1 S.C.R. 417	629, 660
Raja Ram Mahadev Paranjypte v. Aba Maruti Mali, (1961) 1 S.C.R. (Sup.) 739	348
Rajagopala Naidu v. Ramasubramania Ayyar, A.I.R. 1935 Mad. 449	161
Raleigh Investment Company Limited v. Governor-General-in-Council, L.R. (1947) 74 I.A. 50 : (1947) 2 M.L.J. 16	360, 601, 602, 603
Ralla Ram v. The Province of East Punjab, (1949) F.L.J. 8 : (1949) 1 M.L.J. 213 : (1948) F.C.R. 207	154
L. Ram Sarup v. Mt. Kaniz Ummehani, A.I.R. 1937 All. 163	203
L. Ram Sukh Das v. Hafiz-ul-Rahman, A.I.R. 1945 Lahore 177	787
Ramachandra Prasad v. State of Bihar, (1962) 2 S.C.J. 13 : (1962) 2 S.C.R. 50	143
K. A. Ramachar v. Commissioner of Income-tax, (1962) 2 S.C.J. 504 : (1961) 42 I.T.R. 25 : (1961) 3 S.C.R. 380 : A.I.R. 1961 S.C. 1059	738, 741
Ramappa v. Thirumalappa, A.I.R. 1939 Mad. 884	497
Ramanatha Iyer v. Ozhapoor Pathiriseri Raman Nambudripad, (1913) 14 M.L.T. 524	714
Ramayya v. Kotamma, (1922) 42 M.L.J. 319 : I.L.R. 45 Mad. 370	159
Rambalam Pd. Singh v. State of Bihar, A.I.R. 1960 Patna 507	441

Ramchandra Anant v. Janardan, I.L.R. (1963) Bom. 811 : 64 Bom.L.R. 635 : A.I.R. 1963 Bom. 79	348
Ramchandra Doddappa v. Hanamnaik Dodnaik, (1936) I.L.R. 60 Bom. 75	182
Ramdas Vithaldas Durbar v. S. Amerchand & Co., (1916) L.R. 43 I.A. 164 : 31 M.L.J. 541	9, 10, 13, 18
Ramesh Thapar v. State of Madras, (1950) S.C.R. 594 : (1950) 2 M.L.J. 390 : (1950) S.C.J. 418	568, 573
Rameshwar Shaw v. District Magistrate of Burdwan, A.I.R. 1964 S.C. 334	552, 552
Ramgopal Ganpatrai v. State of Bombay, (1958) S.C.J. 266 : (1958) M.L.J. (Cri.) 217 : A.I.R. 1958 S.C. 97	442
Ramkrishna v. Board of Revenue, A.I.R. 1954 Nag. 248	764
Ramkishore Lal v. Kamal Narain, (1963) 2 S.C.R. (Supp.) 417	416
Ramsaroop Singh v. Hiralall Singh, A.I.R. 1958 Patna 319	589
Ramsden v. Dyson, L.R. 1 H.L. App. 129	314
Rao Shiv Bahadur Singh v. The State of Vindhya Pradesh, (1953) S.C.J. 563 : (1953) S.C.R. 1188	229, 230
Ratilal B. Daftari v. Commissioner of Income-tax, (1959) 36 I.T.R. 18	738, 739, 742
Ravula Hariprasada Rao v. The State, (1951) S.C.J. 296 : (1951) 1 M.L.J. 612 : (1951) S.C.R. 322	93, 423
Rawalpindi Theatres Private Limited v. M/s. Film Group, (1958) Bom.L.R. 1373	611
Reference under Article 143 of the Constitution of India, (1965) 1 S.C.J. 847 : (1965) 1 S.C.R. 413 : A.I.R. 1965 S.C. 745	708
Rehi v. Govind Valad Teja, (1875) I.L.R. 1 Bom. 97	181
Reil v. The Queen, (1885) L.R. 10 A.C. 675	692
Remembrancer of Legal Affairs v. Abani Kumar Banerjee, A.I.R. 1950 Cal. 437	46
Rex v. Carr Briant, L.R. (1943) 1 K.B. 607	745
Rex v. Cohen, L.R. (1951) 1 K.B. 505	122
Ridge v. Baldwin, L.R. (1964) A.C. 40	298, 654
Rodriguez v. Speyer Bros., L.R. (1919) A.C. 59	493, 494
Roopchand v. State of Punjab, (1963) 1 S.C.R. (Supp.) 539	647
Ross Clunis v. Papadopoulos, (1958) 1 W.L.R. 546	653
S	
Sabhapathi Chetti v. Narayanasami Chetti, (1902) 11 M.L.J. 346 : I.L.R. 25 Mad. 535	269
In Re, Sacker, <i>ex parte</i> Sacker, (1888) L.R. 22 Q.B. 179	129, 130
Sahabzada Mohammed Kamgar Shah v. Jagdish Chandra Deo, Dhabal Deo, (1960) 3 S.C.R. 604	416
Salisbury House Estate v. Fry, (1930) 15 T.G. 266	404, 408
Saghir Ahmad v. The State of U.P., (1954) S.C.J. 819 : (1955) 1 S.C.R. 707	660
Sahu Madho Das v. Pandit Mukand Ram, (1955) S.C.J. 417 : (1955) 2 S.C.R. 22 : (1955) 2 M.L.J. (S.C.) 1	293, 294
Salem Provident Fund Society Limited v. Commissioner of Income-tax, (1961) 42 I.T.R. 547	547
Sales Tax Officer, Banaras v. Kanhaiya Lal Mukundlal Saraf, (1959) S.C.R. 1350 : (1959) S.C.J. 53 : (1959) 1 An.W.R. (S.C.) 35 : (1959) 1 M.L.J. (S.C.) 35	603
Salig Ram v. Munshi Ram, (1962) 1 S.C.J. 130 : (1962) 1 S.C.R. 470	364
Sambhu Charan Mandal v. The State, (1955-56) 60 Cal.W.N. 708	441
Samuvier v. Ramasubbier, (1931) 60 M.L.J. 527 : I.L.R. 55 Mad. 72	496, 497
Sandoz (India) Limited v. Workmen employed under it, (1962) Indus. Cases Reporter 22	478
Santhosh Kumar v. Bhai Mool Singh, (1958) S.C.J. 434 : (1958) 1 M.L.J. (S.C.) 159 : (1958) 1 An.W.R. (S.C.) 159 : (1958) S.C.R. 1211	610
Sarad v. Gopal, L.R. (1892) 19 I.A. 203	314
Sarjoo Prasad v. State of U.P. (1961) 1 S.C.J. 484 : (1961) 1 An.W.R. (S.C.) 133 : (1961) M.L.J. (Cri.) 284 : (1961) 1 M.L.J. (S.C.) 133 : (1961) 2 S.C.R. 324	94, 423
M/s. Sasa Musa Sugar Works (P.) Ltd. v. Shobhatri Khan, (1959) 2 S.C.R. (Supp.) 836 : (1960) S.C.J. 10 : (1959) M.L.J. (Cri.) 981	451
Sayce v. Coupe, L.R. (1953) 1 K.B. 1	122
Schneider v. Dawson, L.R. (1960) 2 Q.B. 109	122
Secretary of State v. Hindusthan Co-operative Insurance Society Limited, 61 M.L.J. 864 : L.R. 58 I.A. 259 : A.I.R. 1931 P.C. 149	76
Secretary of State for India v. Chellikani Rama Rao, (1916) 31 M.L.J. 324 : I.L.R. 39 Mad. 617 : A.I.R. 1916 P.C. 21	74
The Secretary of State for India in Council v. Jhangir Maneckji Cursetji, (1902) 4 Bom. L.R. 342	269
Secretary of State Representd by the Collector of South Arcot v. Mask & Company, L.R. (1940) 67 I.A. 222 : I.L.R. (1940) Mad. 599 : (1940) 2 M.L.J. 140	600
Shah Mulji Deoji v. Union of India, A.I.R. 1957 Nag. 31	12
Shambhooram v. Emperor, A.I.R. 1935 Sind. 221	441
Shamji Bhanji & Company v. North Western Railway Company, (1918) 48 Bom. L.R. 698 : A.I.R. 1947 Bom. 169	14, 19
Shankar Sahai v. Bhagwat Sahai, A.I.R. 1946 Oudh. 33	774

Shankaranaraina Saralaya v. Laxmi Hengsu, 60 M.L.J. 267 : A.I.R. 1931 Mad. 277 ..	305
Shanti Prasad Jain v. Director of Enforcement, (1963) 2 S.C.R. 297 ..	229
Sheffield Corporation v. Luxford, L.R. (1929) 2 K.B. 180 ..	501
Sheosagar Singh v. Sitaram, (1896) L.R. 24 I.A. 50 ..	774
Shibban Lal Saksena v. State of U. P., (1954) S.C.J. 73 : (1954) 1 M.L.J. 143 : (1954) S.C.R. 418 : A.I.R. 1954 S.C. 179 ..	556, 651, 664
Shivanarayana Mahato v. Collector of Central Excise and Land Customs, C.A. No. 288 of 1964, decided on 14-8-1965 ..	117
Short v. Poole Corporation, L. R. (1926) Ch. 66 ..	652
Shri Ram v. State of Maharashtra, (1961) 1 M.L.J. (S.C.) 221 : (1961) 1 An.W.R. (S.C.) 221 : (1961) M.L.J. (Cr.) 342 : (1961) 1 S.C.J. 677 ..	45
Shri Ram Swarath Sinha v. Belsund Sugar Company, (1954) L.A. C. 697 ..	451
Shri Sachidananda Benerji, Assistant Collector of Customs v. Sita Ram Agarwala, Cr. A. No. 192 of 1961 ..	124, 125
Shri Sharada Peeth Meth, Dwaraka v. Shri Rajrajeshvarashram, A.I.R. 1933 Bom. 276 ..	224
Shyam Behari v. State of M. P., (1964) 2 S.C.J. 226 : 34 Comp.Cas. 430 : A.I.R. 1965 S.C. 427 ..	530
Siddheswar Paul v. Prakash Chandra Dutta, A.I.R. 1964 Cal. 105 ..	146, 152
Simma Krishnamma v. Nakka Latehumanaidu, A.I.R. 1958 A.P. 520 ..	316
Singareni Collieries Company v. Commissioner of Commercial Taxes, A.I.R. 1966 S.C. 563 ..	706
Sita Ram Agarwala v. The State, A.I.R. (1962) Cal. 370 ..	125
Sitaldas Tirathdas v. Commissioner of Income-tax, (1958) 33 I.T.R. 390 ..	738, 739
Smith v. East Elloe Rural District Council, L.R. (1956) A.C. 736 ..	553, 561
Sodhi Shamsher Singh State v. State of Pepsu, A.I.R. 1954 S.C. 276 ..	572
Sree Sree Ishwar Sidhar Jew v. Sushila Bala Dasi, (1954) S.C.J. 17 : (1954) S.C.R. 407 ..	435
Sri Sri Iswari Bhubaneswari Thakurani's Case, L.R. 64 I.A. 203, Affirming on appeal, I.L.R. 60 Cal. 54 ..	429, 434
Srinivas Mall Bairoliya v. King Emperor, (1947) 2 M.L.J. 328 : (1947) I.L.R. 26 Pat. 460 ..	423
State v. Amirtlal Bhogilal, I.L.R. (1954) Bom. 459 ..	94
State v. Bhausa Hamatsa Pawar, (1962) Bom. L.R. 303 ..	90
State Government, M. P. v. Ramakrishna Ganpatrao Limsey, A.I.R. 1954 S.C. 20 ..	675
State Bank of India v. Prakash Chand Mehra, (1961) 1 S.C.J. 591 : (1961) 2 L.L.J. 383 : A.I.R. 1962 S.C. 1261 ..	524, 526, 527
State of Bombay v. F.A. Abraham, (1962) 2 S.C.R. (Supp.) 92 : A.I.R. 1962 S.C. 794 ..	540
State of Bombay v. F.N. Balsara, (1951) S.C.J. 478 : (1951) S.C.R. 682 : (1951) 2 M.L.J. 141 ..	136
State of Bombay v. Bhanji Munji, (1955) S.C.J. 10 : (1955) 1 S.C.R. 777 ..	382, 385, 389
State of Bombay v. K.P. Krishnan, (1961) 2 S.C.J. 360 : (1961) 1 S.C.R. 227 ..	651
State of Bombay v. Narandas Mangilal Agarwal, (1962) 2 S.C.J. 542 : (1962) 1 S.C.R. (Supp.) 15 : (1962) M.L.J. (Cr.) 649 ..	137, 138, 327
State of Bombay v. Purshottam Jog Naik, (1952) S.C.J. 503 : (1952) S.C.R. 674 : (1952) 2 M.L.J. 338 ..	628, 648
State of Bombay v. The United Motors, (India) Ltd., (1953) S.C.J. 373 : (1953) 1 M.L.J. 743 : (1953) S.C.R. 1069 ..	395, 762
State of Kerala v. Aluminium Industries Limited, C.A. No. 720 of 1963, decided on 21-4-1965 ..	362
State of Kerala v. C.M. Francies & Co., (1961) 1 S.C.J. 493 : (1961) M.L.J. (Cr.) 287 : A.I.R. 1961 S.C. 617 ..	652
State of Maharashtra v. Mayor Hens George, (1966) 1 S.C.J. 363 : (1966) M.L.J. (Cr.) 248 : (1965) 35 Camp. Cas. 557 ..	93, 423
State of Orissa v. Madan Gopal Rungta, (1951) S.C.J. 764 : (1951) 2 M.L.J. 645 : (1952) S.C.R. 28 : A.I.R. 1952 S.C. 12 ..	708
State of Punjab v. Mohar Singh, (1955) S.C.J. 25 : (1955) 1 S.C.R. 893 ..	470
State of Tripura v. The Province of East Bengal, (1951) S.C.J. 70 : (1951) S.C.R. 1 : 19 I.T.R. 132 ..	360, 361
State of Uttar Pradesh v. Kartar Singh, (1964) 2 S.C.J. 666 : (1964) M.L.J. (Cr.) 633 ..	94
State of West Bengal v. B.K. Mondal, A.I.R. 1962 S.C. 779 ..	246
State Trading Corporation of India v. State of Mysore, (1963) 2 S.C.J. 131 : (1963) 14 S.T.C. 188 : (1963) 3 S.C.R. 792 : A.I.R. 1963 S.C. 548 ..	600, 706
State Trading Corporation of India Limited v. Commercial Tax Officer, (1964) 4 S.C.R. 99 : (1963) 33 Comp. Cas. 1057 : (1963) 2 Comp. L.J. 234 : (1963) 2 S.C.J. 605 ..	336, 632
Stovin v. Fairbrass, (1919) 88 L.J.K.B. 1004 ..	788
Subbaroya Reddier v. Rajagopala Reddier, (1915) 1 L.R. 38 Mad. 887 ..	713
Subramania Mudaly v. Valu, (1911) 20 M.L.J. 350 : I.L.R. 34 Mad 68 ..	181
Sudarsanam Maistri v. Narasimhulu Maistri, (1902) 11 M.L.J. 353 : I.L.R. 25 Mad. 149 ..	496
Sultan Ali v. Emperor, A.I.R. 1934 Lahore 164 ..	421
Sultan Brothers v. Commissioner of Income-tax, (1964) 1 I.T.J. 160 : (1964) 1 S.C.J. 232 ..	408

Sun Fire Office <i>v.</i> Hart, (1889) L.R. 14 A.C. 98	104, 109, 111
Superintendent, Central Prison, Fatchgarh <i>v.</i> Ram Manohar Lohia, (1960) 2 S.C.R. 821	568, 572
Suraj Mall Mohita & Company <i>v.</i> A.V. Vishwantha Sastri, (1954) S.C.J. 611 : 26 I.T.R. 1 : (1955) 1 S.C.R. 448	659
Surendrakshav Roy <i>v.</i> Doorgasundari Dassee, (1892) L.R. 19 I.A. 108	434
Suresh Chandra Datta <i>v.</i> Ashutosh Datta, A.I.R. 1960 Assam, 24	532, 534
Surtees <i>v.</i> Ellison, (1829) 9 B & C. 752	343
Sutters <i>v.</i> Briggs, L.R. (1922) 1 A.C. 1	20
Syed Ahmad Ali Khan Alavi <i>v.</i> Hinga Lal, I.L.R. (1946) 21 Luck, 586	775
Sye Hai Tong Bank Limited <i>v.</i> Rambler Cycle Company Limited, L.R. (1959) A.C. 576	109

T

Tata Iron Steel Company Ltd., <i>v.</i> S.R. Sarkar, (1960) 11 S.T.C. 655 : (1961) 1 S.C.R. 379 : A.I.R. 1961 S.C. 65	706
Tayen <i>v.</i> Ram Lal, I.L.R. 12 All. 115	4
Teja Singh <i>v.</i> Kesar Singh, A.I.R. 1951 Punj. 117	366
Teju <i>v.</i> Kesar Singh, A.I.R. 1954 Punj. 30	366
Temple of Shri Bankteshwar Balaji through Rampal <i>v.</i> The Collector, Ajmer, I.L.R. (1964) 14 Raj. 1	268
Thirumalappa <i>v.</i> Ramappa A.I.R. 1938 Mad. 133	497
Thompson <i>v.</i> Ddminy, 153 E.R. 532	18
Toolsee Money Dassee <i>v.</i> Sudevi Dassee, (1899) I.L.R. 26 Cal. 361	269
Tukaram <i>v.</i> Dinkar, (1931) 33 Bom. L.R. 289	181

U

Udny <i>v.</i> Udny, L.R. 1 H.L.Sc. 441	584
Smt. Ujjam Bai <i>v.</i> State of U.P., (1963) 1 S.C.R. 778	599, 600
Union of India <i>v.</i> Mohindra Supply Company, (1962) 2 S.C.J. 179 : (1962) 2 M.L.J. (S.C.) 63 : (1962) 2 An. W.R. (S.C.) 63 : (1962) 3 S.C.R. 497 : A.I.R. 1962 S.C. 256	76, 269
Union of India <i>v.</i> Taherali, (1956) 58 Bom. L.R. 650	12, 14
United Motors (India) Limited <i>v.</i> The State of Bombay, (1952) 55 Bom. L.R. 256	362
United Commercial Bank <i>v.</i> The Commissioner of Income-tax, (1958) S.C.J. 46 : (1958) 1 M.L.J. (S.C.) 26 : (1958) 1 An. W.R. (S.C.) 26 : (1958) S.C.R. 79	402, 408
United States of America <i>v.</i> Dollfus Migc, (1952) 1 All E.R. 572	670

V

Valluru Narayana Reddy, In re, (1954) 2 M.L.J. (Andh) 147 : A.I.R. 1955 Andhra 48	441
Vellukunnel <i>v.</i> The Reserve Bank of India, (1963) 1 S.C.J. 210 : (1962) 3 S.C.R. (Supp.) 632	654
Venkata Krishnayya <i>v.</i> Karnedan Kothari, A.I.R. 1935 Mad. 643	322
Venkatakrishnayya <i>v.</i> Malakondayya, (1942) 1 M.L.J. 38 : A.I.R. 1942 Mad. 306	351, 353
K. S. Venkataraman <i>v.</i> State of Madras, (1966) 1 I.T.J. 415 : (1966) 1 S.C.J. 515 : (1966) 1 M.L.J. (S.C.) 108 : (1966) 1 An. W.R. (S.C.) 108 : (1966) 60 I.T.R. 112	362
B. Venkatarathnam <i>v.</i> Registrar Co-operative Societies, A.P., C.A. No. 321 of 1965 decided on 6-5-1965	649
A. V. Venkateswaran <i>v.</i> Ramchand Sobharaj Wadwani, (1962) 1 S.C.J. 170 : (1962) 1 M.L.J. (S.C.) 83 : (1962) 1 An. W.R. (S.C.) 83 : (1962) 1 S.C.R. 753	163, 165
Vine <i>v.</i> National Dock Labour Board, L.R. (1957) A.C. 488	640
Vinter <i>v.</i> Hind, (1882) L.R. 10 Q.B. 36	671
Viraramuthi Udayan <i>v.</i> Singaravelu, (1877) I.L.R. 1 Mad. 306	181
Vyavan Chettiar <i>v.</i> Official Assignee of Madras, I.L.R. 55 Mad. 949 : 63 M.L.J. 615	321

W

P.C. Wadhwa <i>v.</i> Union of India, A.I.R. 1964 S.C. 423	542
M.A. Waheed <i>v.</i> State of M.P., (1954) N.L.J. 305	541
Waman Vasudeo Wagh <i>v.</i> M/s. Pratapmal, Dipaji & Company, I.L.R. (1962) Bom. 206	609
Ward <i>v.</i> Tunner, (1751) 2 Ves. Sen. 431	16
Waryaman <i>v.</i> Kanshi Ram, (1922) I.L.R. 3 Lah. 17	365
William C. Leitch Brothers, In re, L.R. (1932) 2 Ch. 71	657
Willis <i>v.</i> Earl Howel, L.R. (1893) 2 Ch. 545	160
Winans <i>v.</i> Attorney-General, L.R. (1904) A.C. 287	583
Woolmington <i>v.</i> Director of Public Prosecutions, L.R. (1935) A.C. 462	744
Workmen of Dewan Tea Estate <i>v.</i> Their Mangement, A.I.R. 1964 S.C. 1458	465

Y

Yunus Shaikh <i>v.</i> The State, A.I.R. 1953 Cal. 567	441
--	-----

Z

Zaharia <i>v.</i> Debia, I.L.R. (1911) 33 All. 51	776
---	-----

GENERAL INDEX.

ADMINISTRATION OF EVACUEE PROPERTY ACT⁶ (XXXI OF 1950) (as amended by Act I of 1960), Ss. 27 and 58 (3)—Declaration by Deputy Custodian, Lucknow, as evacuee property under Ordinance XII of 1949—Acquisition of that property by Central Government under Act XLIV of 1954—Sale by auction and purchase by R. C. K. in 1957—Revision petition in 1961 by U. P. State to Custodian-General against the order declaring the property as evacuee property in 1949—Maintainability—Exercise of revisional powers in his discretion—Jurisdiction of Supreme Court to interfere in appeal—Additional evidence of copies of evidence—Inconsistent with judicial procedure and Rules of natural justice—Displaced Persons (Compensation and Rehabilitation) Act (XLIV of 1954), S. 12 .. 337

—S. 46—Scope—Property which belonged to an evacuee declared as evacuee property—Person claiming the same as belonging to him not availing of the remedies under the Act—Suit by him for declaration of his title—If barred by S. 46 .. 782

ADMINISTRATIVE SERVICE (RECRUITMENT) RULES, 1954, R. 5 (3)—Distinction in the scope of the rule applicable to married women .. 477

ANDHRA PRADESH PANCHAYAT SAMITHIS AND ZILLA PARISHADS ACT (XXXV OF 1959), Ss. 62 and 72—Powers of Government under—Orders under not legally passed—Powers of High Court to issue writ quashing the latter illegal order .. 270

ARBITRATION ACT (X OF 1940)—Award stating that the existing documents relating to debts obtained on lands would remain as before and remain as securities till repayment—If requires registration under—Registration Act (XVI of 1908), S. 17 .. 285

ASSAM LOCAL SELF-GOVERNMENT ACT (XXV OF 1953), S. 62—Levy of Annual tax by Local Boards for use of any lands for the purpose of holding markets—Constitutionality—Constitution of India (1950), Art. 14—If violated .. 153

ASSAM NON-AGRICULTURAL URBAN AREAS TENANCY ACT (XII OF 1955), S. 5 (1) (a)—If applies to pending execution proceedings .. 531

—S. 5 (1) (a)—Lessee of land building permanent structures "for residential or business purposes"—If structures should be for his own use to entitle him to acquire rights of permanent tenant .. 747

BIHAR LAND REFORMS ACT (XXX OF 1950), S. 14—Claim by mortgagee—Limitation—Considerations .. 208

BIHAR AND ORISSA EXCISE ACT (II OF 1915), S. 27—Notification under, dated 31st March, 1961—Levy of duty (countervailing) on foreign liquor imported from other States—No manufacture of foreign liquor in the State—Validity—Constitution of India (1950), Articles 301, 304, 305, 366 (10) and 372 .. 367

BOMBAY HINDU PLACES OF PUBLIC WORSHIPS (ENTRY AUTHORISATION) ACT (XXXI OF 1956) Ss. 2 and 3—Swaminarayana Sampradaya Satsangis—If distinct and separate from Hindus—Their religion if unconnected with Hindus religion—Swaminarayanan Temple of Sree Narayana Dev at Ahmedabad and its subordinate temples—If Hindu Religious Institutions—Constitution of India (1950), Arts. 25 and 26 .. 502

BOMBAY LAND REQUISITION ACT (XXXIII OF 1948), Ss. 4 (3) and 6—Bombay Rents, Hotels and Lodging Houses Act (LVII of 1947), Ss. 13 (1) (g) and 17—Person evicted in execution of a decree for ejection under the Act of 1947—Requisition of the same premises under the Act of 1948—Allotment to the evicted Person—Legality .. 379

BOMBAY PREVENTION OF GAMBLING ACT (IV OF 1887), S. 7—"Instruments of Gaming"—Proof—If requires expert evidence—Evidence of Police Officer who made the search that articles seized were "instruments of gaming"—If requires corroboration by Expert's evidence in every case .. 723

BOMBAY PROHIBITION ACT (XXV OF 1949), as amended by Bombay Act (XII of 1959), Ss. 24-A (2), 66 (1) (b) 66 (2) and 85 (1) (1)—Consuming liquor contained in a medicinal preparation—When not punishable under S. 66 (1) (b)—Burden of proof .. 324

—Ss. 6-A (as amended by Act XXII of 1960), Ss. 24-A and 59-A—Medicinal preparations (*Mahadrakshasava* and *Dashmoolarishita* alcohol content above 50 per cent. by volume)—Manufacture by distillation process by a licensed person and issue from a bonded warehouse—Possession (on 14th September, 1960), if offends the statute—Exemption under S. 24-A (2)—Applicability—Subsequent declaration (on 4th October, 1960) under S. 6-A if effective .. 133

BOMBAY SALES TAX ACT (V OF 1946), as amended by Bombay Ordinance (II of 1952), S. 20—Scope and applicability—"Assessment made under this Act"—If includes erroneous orders of assessments—Assessment based on erroneous finding as to the nature or character of the transaction—If protected by S. 20—Suit for refund of tax alleged to have been illegally levied and collected on outside sales due to mistake of fact and law—If barred by S. 20—Suit challenging the validity of S. 20 itself—If barred .. 591

BOMBAY SALES TAX ACT (1946)—(Contd.).

—Ss. 13 and 20 (Bombay Sales Tax Act (XXIV of 1952), Ss. 19 and 29)—Advance tax paid by a registered dealer—Provision void under Art. 286 (1) (a) of the Constitution (1950)—Discovered as void in 1952—Suit for refund of tax paid—Mistake of law—If barred—Limitation Act (IX of 1908), Art. 96 .. 359

BOMBAY TENANCY AND AGRICULTURAL LANDS ACT (LVII OF 1948), Ss. 14 (1) and 29 (2)—Default in payment of rent—Notice of termination of tenancy—Application for an order for possession—Starting point of limitation of two years .. 346

CENTRAL SALES TAX ACT (LXXIV OF 1956), S. 5 (2)—Sales in course of import—Not liable to tax—Test .. 703

—S. 9—Scope .. 591

CIVIL PROCEDURE CODE (V OF 1908), S. 11—Operation of bar of *res judicata* under—Conditions to be fulfilled—Two suits having common issues between same parties consolidated and decided by trial Court on merits—Two appeals, one from each suit, filed—One of the appeals dismissed on a preliminary ground—If amounts to appeal being heard and finally decided—Other appeal if gets barred by *res judicata* .. 768

—S. 11—*Res judicata*—Deed of partition between adoptive father and adopted son—Allotment of properties to adopted son and retention of some lands by adoptive father and mother for life—Vested interest to adopted son—Death of adoptive father—Suit against adoptive mother by adopted son claiming possession of entire properties—Defence of right to possession of entire properties by mother—Decision that half the properties to go to adopted son and half to be retained by mother for life—Stray sentence in the judgment that half-share of mother on her death would go to her representatives—If would constitute *res judicata*—Suit for possession by purchaser of the vested interest of the adopted son for the half-share held by the adoptive mother—Decision on a point not necessary for the purpose of the prior suit—Not to constitute *res judicata* .. 259

—S. 60 (1) (g)—Political pension—If includes privy purse given to ex-Ruler .. 285

—S. 86 (1)—Applicability—Suit against foreign State with republican form of Government—Consent of Central Government—Essential—International Law—Foreign State—Immunity from being sued in Municipal Courts .. 25

—Ss. 86 (1) and 87-B—Consent of Central Government—If necessary for proceedings against ex-Ruler under S. 14 of the Arbitration Act (X of 1940) .. 285

—S. 96, O. 6, R. 7—Departure from specific case set up in plaint—Permissibility—New plea of fact not set up in plaint—If can be raised for first time in appeal .. 789

—S. 99 and O. 20, R. 12—Suit by plaintiff—Decree in favour of one of the defendants and against the other defendants—Interference by appellate Court on ground that a decree cannot be passed in favour of a defendant who has not asked for transposition as plaintiff—Bar of section 99—Applicability—Award of mesne profits to

G. P. CODE (1908)—(Contd.).

a person who has not asked for the same—Legality .. 310

—S. 115—Scope .. 576

—S. 151 and O. 29, Rr. 1 to 3—Company—Suit against—Written statement signed by A, a director—Order by Court directing director J. K. to appear in Court to answer material questions—J. K. pleading illness and evading appearance—Number of adjournments granted—Company expressing its inability to compel J. K.—Defence struck off under inherent powers—Propriety .. 731

—O. 22, R. 9—Suit by reversioner in a representative capacity for declaration that alienation made by a Hindu widow is void beyond her lifetime—Widow added as defendant along with the alienees—Death of widow pending suit or pending appeal in suit—Legal representatives of widow necessary parties .. 587

—O. 34, Rr. 7 and 8—Preliminary decree for redemption—Appeal and application for stay—Conditional on undertaking to pay 6 per cent. increase in interest during the period of stay—Deposit of amount due under the preliminary decree—Additional interest due under the stay order not deposited—Deposit proper .. 752

—O. 37, Rr. 2 and 3 (as amended in Bombay) and O. 49, R. 3 (5)—Suits falling within the ambit of O. 37—Leave to defend under O. 37, R. 3 with or without conditions—Grant of—Relevant considerations—Suit on promissory note filed in the Original Side of a Chartered High Court—Grant of conditional leave to defend by High Court—No reasons given for imposition of condition—Validity of order .. 606

—O. 41, R. 33—Power of appellate Court under—When may be properly invoked .. 426

COMPANY LAW BOARD (PROCEDURE) RULES, (1964), R. 3 .. 623

COMPANIES ACT (VII OF 1913), S. 38 and Regulations in Table 'A' First Schedule—Rectification of share register—Transmission by operation of law—'Transfer' and 'Transmission', distinction—Discretion of directors to refuse recognition of transfer—Powers of Court to control .. 393

COMPANIES ACT (I OF 1956), Ss. 10-E, 237, 637 and 642—Investigation—Powers delegated by Central Government to Company Law Board—Order if can be made by the Chairman—Basis, extraneous material—Validity—Jurisdiction of Court—Provisions empowering, if offend Arts. 14 and 19 (1) (g) of the Constitution .. 623

—Ss. 433 (e), 434 (1) (a) and 439 (1) (b)—Civil Procedure Code (V of 1908), O. 40, R. 1—Petition for winding up of a company—Company indebted to a joint Hindu family—Receiver appointed by Court in a suit for partition of the properties of the joint family—Empowered to take necessary proceedings to realise the properties and debts due to the family—If can file a petition for winding up—Statutory notice to pay the debt to Assistant Collector, Bombay, in discharge of income-tax due by the family—If proper and sufficient—Non-compliance amounts to 'neglect to pay' the debt—Petition

COMPANIES ACT. (1956)—(Contd.).

maintainable—Income-tax Act (XI of 1922), S. 46 .. 126

CONDUCT OF ELECTION RULES (1961), R. 94-A—Scope—Affidavit in support of election petition sworn before District Court—Clerk of Court appointed under S. 139 (c), Code of Civil Procedure (V of 1908)—If sufficient compliance with R. 94-A .. 34

CONSTITUTION OF INDIA (1950), Art. 5—Iranian National registered under Foreigner Rules, 1939, residing in India for over 5 years before 21st November, 1949, under residential permits renewed from time to time under Foreigners Order, 1946—If can claim to be citizen of India under Art. 5 of the basis that he had his domicile in the territory of India .. 334

—Arts. 5 and 173—Domicile of origin and domicile of choice—Difference between—Domicile of choice—Acquisition of—Requisites—Proof—Relevant facts .. 579

—Arts. 19 (1) (f) and 32—S. 20 of the Bombay Sales Tax Act (V of 1946), if constitutionally valid .. 591

—Art. 133—Appeal to Supreme Court—New case cannot be set up for the first time. 310

—Art. 133—Appeal to Supreme Court—New plea—Cannot be raised when there is utter lack of factual basis to sustain the plea .. 324

—Art. 133—Appeal to Supreme Court—Person dead at the time of filing of petition of appeal impleaded as one of the respondents—Petition of appeal if a nullity .. 587

—Arts. 133 and 136—Representation of the People Act (XLIII of 1951), S. 116-B—Jurisdiction conferred by Arts. 133 and 136—Cannot be restricted by S. 116-B .. 241

—Arts. 133 (1) and 226—Words “Civil Proceeding” in Art. 133 (1)—Meaning of—Right of appeal under Article 133 (1)—If lies only against judgments, decrees or final orders of High Court made in exercise of appellate or ordinary original civil jurisdiction—If unavailable against orders made in exercise of extraordinary original civil jurisdiction under Art. 226—Order dismissing summarily a petition under Art. 226—If and when amounts to “judgment, decree or final order” .. 762

—Art. 133 (1) (a) and (b)—Dispute as to whether suit property was private alienable property of a public temple—If incapable of valuation for the purposes of Art. 133 (1) (a) or (b) .. 794

—Art. 134 (1) (c)—Scope—Order of conviction by trial Court set aside by High Court on appeal—Application by State for a certificate under Art. 134 (1) (c)—Competency .. 673

—Art. 136—Findings of fact recorded by a Tribunal—Interference with by Supreme Court—Practice .. 445

—Art. 136—Supreme Court Rules, O. 21, R. 2—Appeal lying to Supreme Court on certificate being issued by High Court—Application for Special Leave under Art. 136—Not to be entertained unless certificate is refused .. 673

—Art. 226—Discretion of High Court to issue writs under .. 270

CONSTITUTION OF INDIA (1950)—(Contd.).

—Art. 226—*Habeas corpus* petition by or on behalf of detenu under R. 30 of the Defence of India Rules—Release of detenu on bail pending final disposal of—Jurisdiction of High Court to order .. 707

—Art. 226—Period of impugned contract coming to end after a very short time from date of order—Writ will not be issued to cancel order of Government granting the contract .. 194

—Art. 226—Scope and object—Sales tax assessment—Remedy available under the Sales Tax Act—Petition under Art. 226—Not to be entertained—Nature of order that can be made under Art. 226 .. 161

—Art. 235—District Judge—Is subject to “control” of the High Court—“Control”—Includes disciplinary jurisdictions .. 59

—Art. 244 (2) and Schedule VI, Table A, Paragraph 1 (3), clause (c) to (g), 14, 20 and 21—Administration of Tribal Areas in Assam—Bifurcation and creation of an Autonomous district—Powers of the Governor—Legislation by Parliament, not necessary—Mandatory provisions of para. 14—Compliance essential—Appointment of a commission and report—Recommendations of the Governor .. 679

—Art. 286 (2)—Jammu and Kashmir Motor Spirit (Taxation of Sales) Act 2005, S. 3—Scope—“Retail sales of motor spirit” in the course of inter-State trade during January, 1955 to May, 1959—Property in the goods sold passing inside the State of Jammu and Kashmir—Levy of sales tax under S. 3 of Jammu and Kashmir Act—Validity .. 755

—Art. 311—Right of charge-sheeted officer to be given opportunity to lead oral evidence if he desires—Enquiry officer if can say that having regard to the charges he would not hold an oral enquiry—Civil Services Classification, Control and Appeal) Rules, R. 55—Scope. 184

—Art. 311—Scope—Reversion of a Government servant from a higher officiating post to his substantive post while his junior was retained in the higher officiating post—If amounts to “reduction in rank” as to attract Art. 311 .. 535

—Art. 341 (1)—Constitution (Scheduled Castes) Order, 1950, issued by President under Art. 341 (1)—Public notification regarding scheduled castes—Plea that Dehar caste is a sub-caste of Chamber caste—If can be entertained .. 77

—Art. 339 (1)—Order, dated 3rd November, 1962 as amended on 11th November, 1962 issued by the President of India under—Legal effect .. 661

—Art. 339 (1)—Order dated 3rd November, 1962 made by President of India—Effect—Persons detained under the Defence of India Act, 1962 and the Rules made thereunder—If, how far and on what grounds can challenge before Courts, the order of detention .. 549

CONTEMPT OF COURT—Trial of a member of All India Services before the Special Judge—Pending petition in Supreme Court for transfer—Departmental proceeding for contravention of (Conduct) Rules prohibiting disclosure of official documents and information—Charge of disclosure to his advocates of the member in

CONTEMPT OF COURT—(Contd.).

regard to writ proceeding in High Court—Likely to amount to obstruction of administration of justice and putting person under duress—Contempt—Action of State deprecated .. 139

CONTRACT ACT (IX OF 1872), S. 73—Illustration (k)—Contract by X for sale of iron scraps to Y—Y entering into similar contract with third party for export—Breach by X of original contract—Y unable to supply third party who purchased from open market and recovered the difference in price from Y—Y when entitled to recover the amount as damages from X .. 196

—S. 126—Execution of a joint-promissory note along with two other documents on the same day as security for an overdraft account—Status of one of the signatories to the promissory note if that of co-surety or co-obligant—Determination of—All the documents being parts of same transaction should be read together—Applicability of S. 92 of Evidence Act (I of 1872) .. 317

—As amended by Indian Contract (Amendment) Act (1930), Ss. 172, 178 and 180—Pledge of goods covered by documents of title such as a railway receipt—If could be validly made by owner by transfer of the documents of title representing the goods—Endorsement of railway receipt as security for advances made to the owner of goods—If operates as a pledge of the goods covered by the railway receipt—Right of such endorsee to sue the railway for non-delivery of goods—Measure of damages .. 6

CONTRACT OF INSURANCE—Essentials—Condition in policy giving power for cancellation at will—Mutual—Binding on parties—Power of cancellation to be exercised before commencement of risk .. 101

CRIMINAL PROCEDURE CODE (V OF 1898), Ss. 437—Power to order commitment under—When attracted—Express order of discharge by a Magistrate in respect of an offence exclusively triable by Court of Sessions, if necessary—Exercise of power under the section is discretionary—Should be exercised judicially .. 438

—S. 526 (1) (ii)—Scope—High Court if competent to transfer case pending before a Magistrate for trial to a Court of Sessions Judge .. 42

—S. 527 and Criminal Law Amendment Act (XLVI of 1952), Ss. 6, 7 and 8—Case pending before the Special Judge under the Act of 1952—Petition in Supreme Court for transfer to Court of equal jurisdiction under High Court of another State—Jurisdiction—No inconsistency between Ss. 527 of Code and S. 7 (2) of Act of 1952—Transfer of case—Ground of reasonable apprehension of denial of justice, essential—General feeling of hostility of persons, in sufficient—Likely interference with course of justice to be made out—Practice—Question of inherent jurisdiction—To be tried first before dealing on merits .. 139

CUSTOM—Punjab—Jats in Amritsar District—Customary adoption—Adopted son when entitled to collateral succession .. 363

CUSTOMS ACT (LII OF 1962), Ss. 2 (34) and 110 (3)—Collector of Customs—If a 'proper officer' within S. 110 (3)—Documents seized without authority by a Customs officer at Nagpur sent to Delhi for translation—Order of seizure of the same documents under S. 110 (3) by Collector of Customs, Nagpur while they were at Delhi beyond his territorial jurisdiction—Validity. 665
—S. 105—Scope—'Secreted', meaning of—Power of seizure under—Nature of—When can be exercised .. 665

DEED—Several deeds forming part of one transaction executed on the same day—Construction .. 317

DEFENCE OF INDIA RULES (1962), R. 30—State Government delegating its powers under—If incompetent thereafter to act under R. 30—Single detention order by two Ministers—Validity—Fresh detention order during pendency of *habeas corpus* proceedings against an earlier order—If vitiated by malice—Satisfaction as to necessity for detention—Justiciability .. 716

—R. 30 (1) (b)—Need for detention of a citizen under—Political association of the citizen and his membership of particular political group—If a relevant consideration .. 661

—R. 30 (1) (b)—Scope—Order of detention by District Magistrate—Delegation of power to District Magistrate under S. 40 (2) of the Defence of India Act, without imposition of any conditions—Validity—District Magistrate if can order detention to prevent possible harm outside the limits of his territorial jurisdiction—Order of detention of District Magistrate quoting a wrong notification as giving him power to detain—Effect—Order of detention under R. 30 (1) (b) to prevent acts prejudicial to "public safety," and for "maintenance of law and order"—Legality—"Law and order" if same as "public order." .. 549

—R. 30 (4)—Detention under—Detention order made casually without subjective satisfaction of Authority—Liability to be set aside .. 725

DEFENCE OF INDIA (AMENDMENT) RULES (1963), R. 126-L (2) read with R. 156—Scope—If gives power to seize documents .. 665

ELECTION COMMISSION—Powers—Desirability of legislation vesting powers pointed out .. 166

ELECTRICITY ACT (IX OF 1910) (as amended by Act XXXII of 1959), S. 6—Scope—Electricity Board for the state exercising option to purchase the undertaking but notice to licensee not being in accordance with law—Effect—State Government if vested with the option under S. 6 (2) of the amended Act .. 204

ESSENTIAL COMMODITIES ACT (X OF 1955), S. 7—Contravention of order under S. 3—*Mens rea*—If essential for offence—Madhya Pradesh Foodgrains Dealers Licensing Order (1958), S. 3—Person storing grains in excess of permitted quantity in *bona fide* belief that his application for licence will be duly granted—If guilty of any offence .. 421

EVIDENCE ACT (I OF 1872), Ss. 24 to 30—Confession—Confessional soliloquy—If direct piece of evidence—Weight to be attached to such evidence .. 172

EVIDENCE ACT (1872)—(Contd.).

—S. 115—Estoppel by 'representation'—No estoppel against person who knows the true state of facts .. 310

—Ss. 157 and 32 (7)—Scope and applicability .. 95

FACTORIES ACT (LXIII OF 1948), Ss. 55 and 64 (2) (d)—S. 64 (2) (d) if over-rides S. 55 .. 445

FAMILY SETTLEMENT—Requisites for validity—Registration when essential—Registration Act (XVI of 1908), S. 17—Applicability .. 290

FOREIGN EXCHANGE REGULATION ACT (VII OF 1947) as amended by Act (XXXIX OF 1957), Ss. 23 (1) (a) and 23-D—Contravention of S. 23 (1) committed before the amended Act (XXXIX of 1957), came into force—Adjudication proceedings under the amended provisions—Legality—Amended S. 23 (1) (a) if contravenes Art. 20 (1) of the Constitution of India (1950). .. 227

GUARDIANS AND WARDS ACT (VIII OF 1890), Ss. 25, 47 and 48—Petition under S. 25—Order thereon appealable under S. 47—Appellate order, finality of—Rajasthan Ordinance (XV of 1949), Cl. 18 .. 265

GWALIOR WAR PROFITS TAX ORDINANCE, SAMVAT 2001, as amended by Ordinance, Samvat 2002, Samvat 2004, R. 3 of Schedule I, Explanation—War Profits-tax—Assessee, managing agents of company—Receipt of dividend income on the shares of the company—Business of the company, subject to assessability under the Tax Ordinance—Dividend—Exclusion from taxable income of the assessee under the Explanation enacted subsequent to the Ordinance—Retrospective application .. 397

HINDU LAW—Brahmin woman whose husband was alive becoming concubine of sudra and having children by him—*Avaruddha Stree* entitled to maintenance out of paramours estate for herself and her children—Right to maintenance if destroyed by Hindu Adoptions and Maintenance Act (LXXVII of 1956) coming into force during pendency of appeal against decree giving maintenance .. 179

—Joint family—Hindu brothers—Presumption of joint family—Severance—Onus of proof—Evidence Act (I of 1872), S. 21—Admissions—Admissibility in evidence—Failure to confront under S. 145 maker of such statement in witness-box—Effect .. 53

—Religious endowment—Deed dedicating properties to a religious institution or deity—Construction—Dedication if partial or absolute—Determination of—Relevant considerations—Reasonable provision for maintenance and residence of *shebait*s and their descendants—If inconsistent with absolute dedication .. 426

HINDU SUCCESSION ACT (XXX OF 1956), Ss. 14, 15 and 16—Alienation by Hindu female before Hindu Succession Act came into force—Suit for declaration that alienation is not binding on reversioners—Maintainability after the coming into force of the Hindu Succession Act .. 587

IMPORTS AND EXPORTS CONTROL ACT (XVIII OF 1947) and Imports Control Order (1955)—Red-book of Rules and Procedure for Import trade control for period January—June, 1957—Instructions 71 and 72—Scope—Approval of Chief Controller to division of quota between partners on dissolution—Relates back to date of dissolution—Recognition of quota certificates admissible to partners of dissolved firm after expiry of licensing period—If ground for refusing licence .. 612

INCOME-TAX ACT (XI OF 1922), Ss. 3, 4, 6 and 12—Heads of income—Mutually exclusive—Income assessable under one head—Not to be assessed as falling under the residuary head "other sources"—Nature of income—Time of receipt or manner of treatment by assessee—Immaterial—Assessee, Advocate appointed a Judge—Adopting cash basis of accounting and calendar year—Professional services rendered in practice as Advocate—Receipt of professional fees after discontinuance of profession and after the close of the accounting year, of the year of discontinuance—Income from profession—Not to be assessed under the residuary head as income from "other sources"—Receipt, not taxable .. 401

—Ss. 16 (2) and 18 (5)—Dividend income—Assessee, Hindu undivided family, owner of shares—*Karta* thereof registered holder of the shares—Income assessable as that of Hindu undivided family—Dividend income—Principle of grossing up—Nothing to do with accrual of income—Accrual to the real owner .. 20

—S. 23 (5) (a)—Firm and partner—Registered firm—Assessment—Apportionment of income among partners—Income if assessable in the hands of the partner or as the real income of some other person—If income of another firm—Firm, liable to be assessed—Assessee, partner in a registered firm, carrying on his individual business—Sub-partnership in respect of individual business by assessee and his sons—Deed providing for the division of the share of profits and losses of the assessee in the registered firm—Sub-partnership—Creation of a superior-title—Diversification of income before it becomes the income of the assessee—Assessable as the income of the sub-partnership—Income—Receipt—Application or diversion—Tests .. 735

—S. 34 (1) (b)—Information or change of opinion—Question of law—Reference to be made .. 544

INDUSTRIAL DISPUTE—Conditions of service—Power of Industrial Tribunal to vary—Unmarried women employed in a particular department of employer—Rule requiring their resignation on marriage—To be abrogated as unjustified .. 477

—Dispute arising out of discharge of workmen—Reference to Industrial Tribunal—Absence of domestic enquiry before dismissal as required by Standing Orders—Effect—Employer if can justify discharge before the Tribunal—Jurisdiction of Tribunal .. 445

—Employer, a bank—Order of transfer of an employee—Act in the sole discretion of the Bank—No interference by Industrial Tribunal unless act done *mala fide*—Finding of *mala fide*—To be based on sufficient and proper evidence .. 488

INDUSTRIAL DISPUTE—(Contd.).

—Promotion of two employees overlooking the seniority of some others one of them the second in order—Principles governing the decision of Tribunal—Award directing the superseded persons also to be promoted—Finding of *mala fides* want of consideration on merits and victimization on no evidence—Not proper. 473

—Reinstatement—Compensation in lieu of Discharge of employee—Probation alleged by management—Work unsatisfactory during the period of probation—No enquiry as to unsatisfactory work—Employee alleging *mala fides*—Award of compensation by Labour Court—Interference in appeal. 470

INDUSTRIAL DISPUTES ACT (XIV OF 1947)—Industrial dispute—Standing Orders—Lay-off—Provision for "other causes beyond control"—Sudden slump in world market and consequent financial difficulties—Falls within the scope of Standing Order—Retrenchment—Effect prior to enactment of S. 25-F—Principle of payment of retrenchment compensation, equally applicable—Quantum of compensation—Within the discretion of the Tribunal—No interference by Courts unless vitiated by errors of law or legal principles in its determination. 461

—S. 10—Reference under requiring decision on the question "whether the discharge of workmen concerned was justified"—Scope of reference. 445

INDUSTRIAL EMPLOYMENT (STANDING ORDERS) ACT (XX OF 1946), as amended by Act XXXVI of 1956—Object of—More than one set of Standing Orders—If can be certified under (though fair and reasonable). 480

INSURANCE—Proposals, letters of acceptance, cover-notes and policies, nature and interpretation of—Cover-notes if to accompany letters of acceptance—Reference therein to conditions in policies—If effective. 101

INTERPRETATION OF STATUTES—Rule as to inviolability of vested rights—Not absolute. 784

—Tax Ordinance—Explanation added by first amendment—Second amendment—Insertion of a comma between words in the explanation and enacting comma would be deemed to be always therefrom the date of Tax Ordinance—Intention to render the explanation also retrospective, clear. 397

IRON AND STEEL (CONTROL) ORDER (1956), clause 7—Construction—"Use"—If includes "non-use"—Conditions of permit—Application for permit if can be looked into to find out. 200

JUDICIAL OFFICERS' PROTECTION ACT (XVIII OF 1850), S. 1—Protection afforded to acts done in judicial capacity only—Charge of false imprisonment made against the officer—No formal complaint lodged—No report made by any police officer in writing—No plea by the officer that the act was done in his judicial capacity—Admission that he had acted under the orders of the superior officer—Act was reckless, malicious, concurrent finding of Courts below—No protection under the Act. 1

LAND ACQUISITION ACT (I OF 1894), Ss. 4, 5 and 6—Number of declarations under S. 6—If can be issued successively in respect of different pieces of lands within the locality specified in a notification under section 4 of the Act. 231

—Ss. 6 and 48—Scope—Acquisition for a public purpose—Notification under S. 6 after complying with Ss. 4 and 5-A—Such notification found invalid—Government cancelling invalid notification and issuing fresh notification without again complying with Ss. 4 and 5-A—Validity. 528

LETTERS PATENT (LAHORE) (as amended in 1928), Cls. 10 and 11—Delhi Rent Control Act (LIX of 1958), Ss. 39 and 43—Decision of single Judge of Punjab High Court in Second Appeal under S. 39 of Delhi Rent Control Act—Appeal from to Division Bench of same High Court under cl. 10 of Letters Patent—Competency—S. 43 of the Rent Control Act—Effect. 69

LIMITATION ACT (IX OF 1908), S. 2 (4) Arts. 142 and 144—Art. 142 when attracted—Suit governed by Art. 144—Computation of period of limitation—Tacking of adverse possession of independent trespassers—Permissibility. 157

MADRAS CULTIVATING TENANTS PROTECTION ACT (XXV OF 1955), S. 6-B—Revisional jurisdiction of High Court—Power to interfere with finding of collateral fact—Finding (that a person applying is not a cultivating tenant) and refusing application—If liable to interference in revision. 576

MADRAS ESTATES (ABOLITION AND CONVERSION INTO RYOTWARI) ACT (XXVI OF 1948), Ss. 2 (15), (16) and 3—Madras Estates Land Act (I of 1908), S. 3 (2) (c)—Mothirarambedu village in Madras State—If zamin estate or under-tenure estate—Notification under S. 3 of Act XXVI of 1948 taking over the said estate as zamin estate—Validity. 213

MADRAS HINDU RELIGIOUS AND CHARITABLE ENDOWMENTS ACT (XIX OF 1951), S. 62 (3-a)—Application by Commissioners for modifying Scheme under which the Trustee was administering the Temple—No proof of any of the charges levelled against trustee—Appointment of an Executive Officer to be in charge of administration—Not warranted—Madras Act XXII of 1959 enacted after the suit—Plenary powers of Commissioner. 81

—Ss. 62, 93, 103 (i)—Institution held to be not a Math under the Madras Act II of 1927—Finality of the decision—Claim for contribution and audit fees on the basis that it was a Math—Not sustainable under Madras Act II of 1927—Injunction to restrain levy of contribution under Act XIX of 1951—Question cannot be entertained in a suit not instituted under S. 62 of the Act of 1951—S. 103 (1) of Act of 1951—No continuance of levy was alleged under the Act of 1927—Estoppel—Institution is one outside the Act of 1927—Act of Head of institution—Not to affect the position of the Institution. 175

MAHARASHTRA CO-OPERATIVE SOCIETIES ACT (XXIV OF 1961), Ss. 23 (3) and 154—Scope of S. 154—Finality of order under S. 154. 154

MAHARASHTRA CO-OP. ACT (1961)— (Contd.).

23 (3) whether subject to S. 154—Power under S. 154 if can be exercised on application by a party .. 498

MOTOR VEHICLES ACT (IV OF 1939), Ss. 58 and 63 and C. P. and Berar Motor Vehicles Rr. 1940, Rr. 61, 62 and 63—Scope—Inter-regional permits, renewal of—Renewal of counter-signature for a different region—Authority competent to make—Word 'may' in R. 63 (a) .. 354

—S. 63 and Central Provinces and Berar Motor Vehicles Rules (1940), R. 63—Scope and effect—Inter-regional permit—Renewal of permit but refusal of counter-signature—Effect—If Regional Transport Authority having jurisdiction over rest of route to give counter-signature .. 37

MYSORE UNIVERSITY ACT (XXIII OF 1956), Ss. 22, 23 and 43—Powers of Academic Council under—If includes power to make a regulation that no candidate who fails four times shall be permitted to continue the Bachelor of Veterinary Science Course .. 306

MYSORE VILLAGE OFFICES ABOLITION ACT (XIV OF 1961)—Constitutional validity—Act if void as colourable legislation .. 329

NATIONAL INDUSTRIAL TRIBUNAL (BANK DISPUTES) AWARD OF JUNE, 1962 (DESAI AWARD), Paragraph, 5-356—Directions contained in as to fitment into Sastry award of workmen who entered service before 1st January, 1959—Proper interpretation. 522

PATIALA AND EAST PUNJAB UNION GENERAL PROVISIONS (ADMINISTRATION) ORDINANCE (XVI OF 2005 (BK), Ss. 13 and 14 (2)—Order of dismissal—When becomes effective—Person in the employment of Patiala and East Punjab States Union—Dismissal in contravention of S. 14 (2)—Suit against State challenging the dismissal—Maintainability .. 777

PAYMENT OF WAGES ACT (IV OF 1936), Ss. 2 (vi) (d), 2 (6)—Scope—Wages—Gratuity payable to workmen made under an award by Industrial Tribunal—Application by workmen for recovery of gratuity—Application after employer-newspaper ceasing publication—Amount recoverable under the Act as wages—'Instrument' in payable under an 'instrument' includes an award of industrial adjudication—Gratuity payable under an award—Not amounts to payable under any law or contract .. 457

PENAL CODE (XLV OF 1860), S. 84 and Evidence Act (I of 1872), S. 105—Illustration (a)—Scope—Defence of insanity—Onus .. 281

—S. 95—Applicability—"Harm"—If excludes physical injury .. 720

PRACTICE—Single judge considering earlier decision require reconsideration—Proper procedure .. 295

PREVENTION OF CORRUPTION ACT (II OF 1947), S. 5 (2) read with S. 5 (1) (d)—Offence under—Proof of payment of money—Presumption under S. 4 (1)—Onus on person against whom presumption is drawn and the prosecution—Comparative extent of .. 742

PREVENTION OF FOOD ADULTERATION ACT (XXXVII OF 1954), S. 2 (xii)—"Sale"—Includes sale to Food Inspector for analysis—*Mens rea*—Defence of S. 16 (1) (a) read with S. 7 (v)—Prosecution for offences under—Certificate of Public Analyst—If sufficient to his conviction—Joint trial of wholesaler of Bombay and retail seller of Nasik—Legality—Criminal Procedure Code (V of 1898), Ss. 537 (b) and 182—Scope .. 87

—S. 23—Rules framed under Appendix-B A-11.03—Butter milk—Standard prescribed—If should contain same amounts of solids not fat as curds .. 676

PROVINCIAL INSOLVENCY ACT (V OF 1920), Ss. 6, 7 and 25—Debtor's property sold in execution of money decree—Sale set aside under O. 21, R. 89, Civil Procedure Code—Act of insolvency if wiped out—If sufficient cause for refusal to adjudicate under S. 25 .. 350

PUNJAB RELIEF OF INDEBTEDNESS ACT (VII OF 1934), Ss. 5 and 6—Retrospectivity sanctioned by S. 6—Scope and extent of—Applicability of S. 5 to 'pending suits'—'Pending suit', 'meaning of—If includes 'pending appeal' from the suit—Suit instituted in Delhi to enforce a mortgage—Preliminary decree passed—Punjab Relief of Indebtedness Act extended to Delhi during pendency of appeal from such preliminary decree—Application before Appellate Court for relief under S. 5—Maintainability .. 784

RAILWAY ESTABLISHMENT CODE, VOLUME I, Rules 1609 to 1619—Scope. 535

RAJASTHAN MINOR MINERAL CONCESSION RULES, R. 36—Auction for grant of royalty collection contract—Government if bound to accept highest bid and confirm contract—Direction of Government to relax the Rules—R. 59 .. 194

REGISTRATION ACT (XVI OF 1908), S. 17—Award—When requires registration .. 285

—S. 17 (1)—Applicability—Karar executed by a partner—His share in the 'machine, etc., and business' given up and 'made over' to the other partner—Recital, certain immovable property had been given to executant—Partnership Act (IX of 1932), S. 48 .. 490

RELIGIOUS ENDOWMENT — Math—Expenses of suit by the rightful claimant to Gaddi—Binding on the Math and its properties—Mortgage by the Mathadhipati to secure payment of such debts—Alienation of properties to salvage a part of the property sold under the sale in execution of the mortgage decree—Legal necessity—Test of .. 220

REPRESENTATION OF THE PEOPLE ACT (XLIII OF 1951), S. 39 (4) and Conduct of Election Rules, R. 4—Nomination paper filed for election to an Assembly seat—'Star' symbol reserved for Swatantra Party entered in the first space—The other two spaces left blank—Candidate not of Swatantra Party—If defect of substantial character—Rejection of nomination not proper .. 714

—S. 192 (2)—Construction and scope—Question of disqualification—How can be raised .. 166

—(as amended by Act LVIII of 1958, S. 7 (d)—Scope—Effect of amendment made in

INDEX OF RECENT CASES.

BOMBAY PUBLIC TRUSTS ACT (1950), S. 19—Madhya Pradesh Public Trust Act, (XXX of 1951), Ss. 5, 6, 7 and 8—The Bombay Public Trust (Unification Amendment) Act, 1959—Definition of Public Trust under S. 2 (4) of the M. P. Act—Bombay Societies Registra- tion Act (VI of 1960), S. 86 .. 9	MADRAS HINDU RELIGIOUS AND CHARITABLE ENDOWMENTS ACT (L OF 1951), —Madras Act II of 1927—Specific Relief Act, S. 42—Civil P. C., 1859, and 1877—Effect of compromise—Legislative History discussed. 1
CONTRACT ACT (IX OF 1872), S. 55— —Time as the essence of the contract .. 10 —Ss. 140 and 141—Scope (S.C.) .. 11	MALABAR TENANCY ACT, 1929 (MADRAS ACT) (XIV OF 1930), Ss. 21 read with S. 3 (15)—Kerala Land Reforms Act, 1963 (I of 1964)—Kanam-Kuzhikanam—Transfer of Property Act, 1882 .. 14
CRIMINAL P. C. (V OF 1898), S. 561-A— High Court if can cancel bail granted under S. 426 .. 3	PENAL CODE (XLV OF 1860), S. 161 and S. 5 (2) of the Prevention of Corruption Act (II of 1947)—Presumption under S. 4 (1) of the Prevention of Corruption Act .. 15
CRIMINAL TRIAL—First complaint under Ss. 420, 109, 114 and 120-B, Penal Code— Second complaint under Ss. 204, 211 and 385, Indian Penal Code—Competency .. 8	—S. 330—Criminal P. C. (V of 1898), Ss. 207-A and 209 .. 11
DEFENCE OF INDIA RULES (1963)— R. 30— <i>Habeas Corpus</i> Petition— <i>Mala fide</i> de- tention—Articles 14, 21, 19, 22, 358, 359 (1) of the Constitution .. 2	—Ss. 417 and 420—Scope—Criminal Pro- cedure Code (V of 1898), S. 197—Sanction of Central Government—When essential for pros- ecution for cheating and abetment .. 7
DISPLACED PERSONS (DEBT ADJUST- MENT) ACT (LXX OF 1951), S. 5—Definition of displaced debtor' and 'debt' under S. 2 .. 15	SPECIFIC RELIEF ACT (I OF 1877), Ss. 23-B, 27-B—Indian Contract Act (IX of 1872), Ss. 37 and 40—Whether the covenant of the pre- emption offends the rule against perpetuities and is therefore void and not enforceable even against the original contracting parties .. 14
HINDU LAW—Father's right to mortgage immovable property for antecedent debt incurred without legal necessity—Sons right to restrain the execution of the decree or the sale of the property in execution proceedings without showing either that there is no debt for which the father is personally liable to be paid or that the debt has been incurred for an illegal and immoral purpose .. 5	TRANSFER OF PROPERTY ACT (IV OF 1882), S. 123—Deed of release—Vitiating by misrepresentation—Whether a valid conveyance .. 13
—S. 3 of Act (XVIII of 1937), as amended by Act XI of 1938—Hindu women's estate— —Coparcenary property .. 4	U. P. HIGHER JUDICIAL SERVICE RULES —"Meaning of Judicial Officers"—Arts. 233, 236, 14 and 16 of the Constitution—Powers of the Governor—Whether the Rules are <i>ultra vires</i> the Constitution—Powers of the High Court to appoint District Judges .. 5
MADRAS HINDU RELIGIOUS AND CHARITABLE ENDOWMENTS ACT (XIX OF 1951), Ss. 87, 93—S. 92, Civil P. C.—Amending Act (II of 1927), S. 73—Madras Act X of 1946. 12	

tion primarily upon the method of computation of taxable income of the life insurance business and of the general insurance business. Both in respect of the life insurance business and general insurance business, there are, as already mentioned, special methods of computation of income. But because there are distinct methods of computation of taxable income of the insurance business, and the general provisions of the Income-tax Act relating to computation of profits and gains of a business in section 10 and the related sections are inapplicable, it does not follow that the two businesses cannot be the "same business" within the meaning of section 24 (2). Whether two or more lines of business, may be regarded as the "same business" or different businesses depends not upon the special methods prescribed by the Income-tax Act for computation of the taxable income, but upon the nature of the businesses, the nature of their organisation, management, source of the capital fund utilised, method of book-keeping and a host of other related circumstances which stamp them as the same or distinct.

In the present case, there is little doubt that the two businesses constituted one composite business : the company was entitled to carry on the life insurance business and the general insurance business under its memorandum of association, and the businesses were attended to by the branch managers and the agents without any distinction, there was one common administrative organization and the expenses incurred in connection with the business both for administration and for heads of expenditure such as salary of the staff, postage, staff welfare fund and general charges, were common.

We are unable to agree with Counsel for the Commissioner that the test whether one of the businesses can be closed without affecting the conduct of the other business, is a decisive test in determining whether the two constitute the same business within the meaning of section 24 (2). If one business cannot conveniently be carried on after the closure of the other, there would be a strong indication that the two businesses constitute "the same business", but no decisive inference may be drawn from the fact that after the closure of one business another may conveniently be carried on.

In the present case the Tribunal's judgment proceeds not upon any special circumstances governing the distinctive organization, management, accounts, methods of book-keeping or the peculiarities of the two businesses, but primarily upon the provisions of the Income-tax Act which provide different methods of computation of the taxable income of the life insurance business and of the general insurance business. We are unable to agree with the Tribunal, that because in respect of the life insurance business and general insurance business there are special methods of computation of income for the purpose of levying income-tax, they are not the "same business" within the meaning of section 24 (2). A fairly adequate test for determining whether the two constitute the same business is furnished by what Rowlatt, J., said in *Scales v. George Thompson & Co., Ltd.*¹ :

"Was there any inter-connection, any interlacing, any inter-dependence, any unity at all embracing those two businesses?"

That inter-connection, interlacing, inter-dependence and unity are furnished in this case by the existence of common management, common business organisation, common administration, common fund and a common place of business.

In our view therefore the High Court was right in holding that the life insurance business and the general insurance business constitute the same business within the meaning of section 24 (2) of the Act.

The appeals therefore fail and are dismissed with costs. One hearing fee.

T.K.K.

Appeals dismissed.